

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

69

No. 24,221

Citizens Communications Center, et al.
Appellants

v.

Honorable Dean Burch, Chairman Federal
Communications Commission, et al., Appellees

No. 24,471

Citizens Communications Center,
Black Efforts for Soul in Television,
Albert H. Kramer, William D. Wright,
Petitioners

v.

Federal Communications Commission &
United States of America,
Respondents

No. 24,491

Hampton Roads Television Corporation and Community
Broadcasting of Boston, Inc., Petitioners

v.

Federal Communications Commission and
United States of America, Respondents
RKO General, Inc. (RKO), Dudley Station
Corporation, and WTAR Radio-TV Corpora-
tion, Intervenors

Petition for Review of Order of the
Federal Communications Commission

P.5-6

JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 18 1970

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No. 24,221

Citizens Communications Center, et al.
Appellants

v.

Honorable Dean Burch, Chairman
Federal Communications Commission,
et al.

DOCKET ENTRIES IN UNITED STATES DISTRICT COURT
NO. 42-70

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PROCEEDINGS

1970

Jan. 7	Complaint, appearance	
Jan. 7	Summons, copies (10) and copies (10) of Complaint issued All Defts. serv. 1/9/70; D.A. & A.G. serv. 1/8/70	
Jan. 7	Motion for temporary restraining order: Certificate of Attorney: Affidavit, Appendix I: Memorandum of Law	filed
Jan. 7	Motion for preliminary injunction. M. C. 1/8/70	filed
Jan. 8	Motion of 1/7/70, preliminary injunction; M. C. (error)	filed
Jan. 7	Application for temporary restraining order - denied (fiat) (N)	McGuire, J.
Jan. 14	Motion of pltfs. to produce; P&A; c/m 1/14/70; exhibit; M.C.	filed
Jan. 14	Supplemental memorandum of P&A by pltf. in support of motion for preliminary injunction; c/m 1/14/70; Exhibit	filed
Jan. 15	Suggestion by defts. of lack of jurisdiction and oppo- sition to motion for preliminary injunction; affidavit; c/m 1/14/70	filed
Jan. 16	Withdrawal of motion to produce documents, as per counsel for pltfs.	filed

Jan. 23 Supplement to defendants' opposition to pltfs' motion
for preliminary injunction; Exhibit; c/m 1/22/70 filed

Feb. 2 Order dismissing action; denying as moot pltfs' motion
for preliminary injunction. (N) Jones, J.

Apr. 1 Notice of appeal by pltfs. from order of 2/2/70,
deposit \$5.00 by Dobrovir; copies mailed to Thomas A.
Flannery and Joseph M. Hannon filed

ITEMS IN THE RECORD

Item No.

1. Petition for Rulemaking filed by BEST, January 9, 1970.
2. Commission Memorandum Opinion and Order released January 16, 1970, dismissing Item 1.
3. Commission Policy Statement on Comparative Hearings Involving Regular Renewal Applicants issued January 15, 1970.
4. Motion to Accept Petition for Reconsideration in Excess of 25 Pages filed February 16, 1970, by Hampton Roads Television Corp.
5. Petition for Reconsideration of Item 3 filed February 16, 1970, by Hampton Roads Television Corp.
6. Petition for Repeal of Item 3 filed February 16, 1970, by BEST.
7. Petition for Reconsideration of Item 2 filed February 16, 1970, by BEST.
8. Petition for Reconsideration of Item 3 filed February 16, 1970, by BEST.
9. Motion for Extension of Time filed February 25, 1970, by WTAR Radio-TV Corp.
10. Commission Order released March 2, 1970, setting time for filings.
11. Withdrawal of Item 9 filed March 5, 1970, by WTAR Radio-TV Corp.
12. Opposition to Petitions for Reconsideration filed March 12, 1970, by WTAR Radio-TV Corp.
13. Petition for Waiver of Section 1.106(g) to Accept Pleading in Excess of 25 Pages filed March 12, 1970, by RKO General et al.
14. Opposition to Petitions for Reconsideration filed March 12, 1970, by RKO General et al.
15. Erratum in Item 15 filed March 13, 1970, by RKO General et al.
16. Reply to Oppositions filed March 27, 1970, by Hampton Roads.

Item No.

17. Petition for Extension of Time filed March 27, 1970, by BEST.
18. Commission Order released April 1, 1970, granting BEST extension request.
19. Reply Comments filed April 10, 1970, by BEST.
20. Motion to Expedite filed June 3, 1970, by BEST.
21. Commission Memorandum Opinion and Order released July 21, 1970, denying all pending petitions.
- . Certificate of Secretary

F.C.C. 70-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re

POLICY STATEMENT CONCERNING COMPARATIVE
HEARINGS INVOLVING REGULAR RENEWAL
APPLICANTS

JANUARY 15, 1970.

THE COMMISSION, BY COMMISSIONERS BURCH (CHAIRMAN), BARTLEY,
ROBERT E. LEE, COX, H. REX LEE, AND WELLS, WITH COMMISSIONER
JOHNSON DISSENTING AND ISSUING A STATEMENT, ISSUED THE FOLLOW-
ING PUBLIC NOTICE:

In 1965 the Commission issued a policy statement on comparative broadcast hearings which is applicable to hearings to choose among qualified new applicants for the same broadcast facilities. See "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 393. We believe that we should now issue a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license. We have, of course, set forth our policies in this respect in several cases, and indeed, have done so in designating issues in some very recent cases. For example, *In re Application of RKO General, Inc.*, F.C.C. 69-1335, paragraph 8; *In re Application of Lamar Life Broadcasting Co.*, F.C.C. 69-1336, paragraph 2. There has, however, been considerable controversy on this issue, as shown by the hearings on S. 2004 now going forward before the Senate Subcommittee on Communications. Issuance of this statement will therefore contribute to clarity of our policies in this important area. This will be of assistance to the examiners who initially decide the cases. It will expedite the hearing process and promote consistency of decision. Above all, by informing the broadcast industry and the public of the applicable standards, the public interest "in the larger and more effective use of radio" (sec. 303(g) of the Communications Act) will be served.

The statutory scheme calls for a limited license term. This permits Commission review of the broadcaster's stewardship at regular intervals to determine whether the public interest is being served; it also provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest. It is this latter aspect of the statutory scheme with which we deal here. See sections 307, 308, 309.

The public interest standard is served, we believe, by policies which insure that the needs and interests of the listening and viewing public will be amply served by the community's local broadcast outlets. Promotion of this goal, with respect to competing challenges to renewal applicants, calls for the balancing of two obvious considerations. The first is that the public receive the benefits of the statutory spur inherent

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*This is
excluded*

(The public interest)

in the fact that there can be a challenge, and indeed, where the public interest so requires, that the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.

We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area,¹ and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), where the Commission, in favoring the existing licensee, stated that where a choice must be made between an existing licensee and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of ownership and management. The *WBAL* policy was followed in *In re Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963), and cited with approval in recent actions (see, e.g., *In re Application of RKO General, Inc.*, F.C.C. 69-1335, par. 8).

If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the con-

¹ We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid", "strong", etc. (see p. 3, supra) performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish between two types of situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

trary, if the competing new applicant establishes that he would substantially serve the public interest,² he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest.

We recognize that the foregoing policy does not work with mathematical precision, and that particular factual circumstances will have to be explored in the hearing process. For example, if there are substantial questions as to whether the renewal applicant's operation has been characterized by serious deficiencies—such as rigged quizzes, violations of the Fairness Doctrine, overcommercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertisers—the facts as to these matters would have to be established, and any demerits resulting therefrom weighed against the renewal applicant in the public interest judgment which must be made. It is not possible to lay down any more precise standards here, since so much will depend on the particular facts.

Further, we recognize that the terms "substantially" and "minimally" also lack mathematical precision. However, the terms constitute perfectly appropriate standards. Thus, the word "substantially" is defined as "strong; solid; firm; much; considerable; ample; large; of considerable worth or value; important" (Webster's New World Dictionary College Edition, p. 1454);³ the word "minimal" carries the pertinent definition, "smallest permissible" (Id. at p. 937). However, application and evolution of the standards would again be left to the hearing process. The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainties of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service are also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field.

Two other points deserve stress in this respect. First, unlike the case involving new applicants (see 1 F.C.C. 2d at pp. 397-98), a

² With several such new applicants, the "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 392, would be the basis for decision as among them.

³ We also note that the term is frequently employed in statutes, e.g., 15 U.S.C. 13 (the Clayton Act); 42 U.S.C. 403(f)(4)(A) (Social Security Act); 26 U.S.C. 382(a)(1)(C) (Internal Revenue Act); indeed, it is used in the Communications Act, 47 U.S.C. 803(b)(1)(A).

programming record will be considered even though it is not alleged to be either unusually good or bad. Thus, the renewal applicant will not have to demonstrate that his past service has been "exceptionally" or "unusually" worthy. Were that the criterion, only the exceptional or unusual renewal applicant would win a grant of continued authority to operate, and the great majority of the industry would be told that even though they provide strong, solid service of significant value to their communities, their licenses will be subject to termination. As stated at the outset, such a policy would disserve the public interest. And conversely, a new applicant would not have to allege that the existing licensee's operation had been unusually bad.

Second, the renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then upgrade to show substantial service. Therefore, no evidence as to improved service after the filing of the competing application (or a petition to deny directed to programming service) will be deemed admissible in the hearing. This is, of course, a departure from the procedure permitted in the *WBAL* case.

Further, the renewal applicant, seeking to obtain the benefits of this policy, cannot properly supply minimal service during the first 2 years of his license term and then upgrade during the third year because of the imminence of possible challenge. The act seeks to promote conscientious and good faith substantial service to the public—not a triennial flirtation with such service. Therefore, while we recognize that the licensee's programming efforts do and must vary over a license period and hopefully are continually being improved, we could not weigh as controlling or determinative a pattern of operation which showed substantial service only in the last year of the license term.

We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. See 1 F.C.C. 2d at pp. 394-95. We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. For example, *In re Application for Renewal of WTOP-TV*, F.C.C. 69-1312. Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media

holdings.⁴ Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rulemaking proceedings. For example, FCC dockets Nos. 18110 and 18397. If any rulemaking proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and "best conduces to the proper dispatch of business and the ends of justice;" section 4(j) of the Communications Act; *WJR v. F.C.C.*, 337 U.S. 265, 282 (1948). In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged,⁵ the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings.

We believe the issuance of this policy statement will expedite the hearing process in this area. Examiners will be clear as to our general policy. Indeed, it may significantly shorten hearings. If the examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. However, where the matter is in any way close or in doubt, it would be more appropriate to proceed with the hearing, and thus insure that the record is complete when the matter comes before the Commission.

Most important, as stated above, the policy will markedly serve the public interest by informing the broadcast industry and the public of their responsibilities and rights. And, in doing so, it retains the competitive spur provided in the Communications Act and yet insures predictability and stability of broadcast operations. For the policy says to the broadcaster, "if you do a solid job as a public trustee of this frequency, you will be renewed; your future is thus really in your hands." The policy says to all interested persons, "The act seeks to promote not just minimal service but solid, substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application and will be afforded the opportunity, in a hearing to establish your case. If you do so, you will be granted authority to operate on the frequency

⁴ Of course, if such a renewal applicant has not rendered substantial service, he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant.

⁵ *In re Applications of Midwest Television, Inc.*, F.C.C. 60-261; *In re Applications of Chronicle Broadcasting Company*, F.C.C. 60-262.

in place of the renewal applicant who has failed to provide substantial service."⁶

The policy is thus fair to the broadcaster and to the new contestant, and above all it serves the listening and viewing public. To the argument that the hearing process itself is an unfair burden, the short answer is that such hearings stem directly from the statutory scheme, and particularly from the notion that the broadcaster is a public trustee who can acquire no permanent ownership of the frequency on which he operates. With even-handed administration of the policy, there is unlikely to be any plethora of frivolous challengers, in view of the significant costs involved.⁷ And in any event, where frivolous challenges are made, the examiner may in his discretion, and should, take action to avoid a long drawn out hearing. In the final analysis, the broadcaster has, we believe, the answer within his hands—if he really knows and cares about his area and does a good substantial job of serving it, he will discourage challenges to his renewal applications.

We recognized that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated, there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. We believe that there will still be real incentives for those existing broadcasters willing to provide superior service to do so, since the higher the level of their operations, the less likely that new applicants will file against them at renewal time. And as the Commission spells out, in decided cases, the elements which constitute substantial service, it will serve the private interests of broadcasters to make certain that their operations fall clearly into that class of service. Thus the public interest will be served by the continuing efforts of broadcasters to minimize the chances of the filing of competing applications.

The foregoing policy is limited to comparative hearings between renewal applicants and new applicants for the same facilities in the same community. The restriction to the same community is necessary to exclude from this policy contests between applicants for different communities which are governed by the provisions of section 307(b) of the act, since this section requires that the grant go to the community most in need of the station, without regard to the comparative qualities of the applicants. In practical effect, this section applies solely to standard broadcasting.⁸ Such AM cases involve considerations quite different from those with which the Commission is concerned here, and are thus not dealt with in this statement.

⁶It would be expected that appropriate arrangements could and would be made to purchase facilities owned by the existing station. See, e.g., *In re Application of Biocayne Television Corp.*, 33 F.C.C. 851 (1962).

⁷We wish to stress, with the issuance of this statement, that barring extraordinary circumstances, the challenger to a renewal cannot be reimbursed in any amount for his expenditures in preparing and prosecuting his application, nor will merger agreements be countenanced.

⁸The policy set forth herein will apply where a new applicant files against a renewal applicant, seeking to use the contested FM or TV channel in a different community under the provisions of secs. 73.203(b) or 73.607(b) of our rules.

As shown by our recent actions (see p. 1, *supra*), this policy is of course applicable to pending proceedings, and indeed, we stress again that its essential holding reflects long established precedent. The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for *sui generis* reasons, is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the *WBAL* policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 393 (1965).

In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The issues surrounding citizen participation in the license renewal process are among the most complex and significant before the FCC.

The nature of the American political process is such that any efforts to regulate broadcasting by either Congress or this Commission must constitute a negotiated compromise of sorts. That the broadcasting industry today is perhaps the most powerful Washington lobby in our Nation's history is generally acknowledged. Popular reform movements always start with a substantial disadvantage. For none is that more true than for those groups trying to improve the contribution of television to the quality of American life. But, then, the stakes are higher.

There is no question but that the American people have been deprived of substantial rights by our action today. There is also no question that the results could be much worse—given the commitment of the broadcasting industry on this issue, and the introduction of legislation (such as S. 2004) by 22 Senators and 118 Representatives.

The policy statement has been discussed by us calmly and at length. Each Commissioner has endeavored to balance the conflicting interests of broadcasters and public. The language has been revised in a spirit of accommodation; the public interest is better served as a result. Because of my participation in these drafting efforts I feel considerable inclination to concur. On agonizing balance, however, I find I cannot.

There is a germ of legitimate concern in the broadcasters' position. (1) It is inequitable that a broadcaster who has made an exceptional effort to serve the needs of his community, and whose programing is outstanding by any measure, should be subjected to the expense

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and burden of lengthy hearings merely because some fly-by-night chooses to take a crack at his license. (2) When evaluating a competing application in a renewal case, a record of outstanding performance by the licensee obviously should be given considerable weight. (3) It is far better to provide consistent national standards for station ownership by general rulemaking (with divestiture if necessary) than to involve them on the case-by-case happenstance of which stations' licenses happen to be challenged. (4) There are some public benefits from stability for those broadcasters who take their responsibilities seriously.

What the public loses by this statement can be summarized in the word "competition." The theory of the 1934 Communications Act was that the public would be served by the best licensee available. No licensee would have a right to have his license renewed. Each would be open to the risk that a competing applicant would offer a service preferable in some way, and thereby win the license away. The FCC was to choose the best from among the applications before it, whether the incumbent's record was mediocre or excellent. This is the principle of the marketplace: the public is assured the best products by opening the market to all sellers, comparing their products, and rewarding the best with the greater sales. The analogy in broadcasting is the competing application. The FCC is the public's proxy. It is we who must make the choice among competitors; it is the public that receives the benefits (or burdens) of our choice.

What we have done in this policy statement is comparable to providing that there could be no new, competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not substantially serving the public interest. The affected industry's arguments on behalf of such a policy would be quite similar to those presented by the broadcasters in this instance. But this country has long believed that the public will be better served over the long run by free and open competition. And after lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry.

Given the harsh political reality that the broadcasters have the power to obtain some measure of protection against competing applications, there are at least some possible public benefits from the policy statement we have drafted.

It is impossible, or at least unlikely, that there would ever be a sufficient number of public organizations to contest each of the 7,500 radio and television station licenses in this country. Any truly effective efforts at reform will have to apply to all stations equally. This FCC policy statement may have some salutary impact industrywide.

What we have created, in effect, are four levels of performance: (1) Not minimally acceptable. A licensee in this category will not have his license renewed, whether or not it is contested. (2) Minimally acceptable. If it meets this standard, a licensee without a competing application will be renewed by the Commission. If it is challenged, however, it will be set for hearing. (3) Substantial service. If a licensee is challenged at renewal by a competing applicant, the hearing will be terminated if the examiner finds, after initial evaluation, that the

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licensee has been "substantially attuned to meeting the needs and interests of its area." This amounts to a form of summary judgment, saving both broadcaster and challenger the burden of a lengthy hearing likely to be futile. (4) Comparative public interest. If a licensee under challenge by a competing applicant cannot meet the substantial service standard, a full evidentiary hearing will be held. The licensee must then demonstrate that its renewal will serve the public interest, and would be comparatively preferable to awarding the license to the challenger.

The upshot may very well be an improvement in radio and television programming performance by all licensees.

At the present time many broadcasters know that a minimal performance is all that's required for license renewal. This belief is exacerbated by an FCC majority's willingness to find that no news and public affairs adequately serves the public interest, Herman C. Hall, 11 F.C.C. 2d 344 (1968), and that a licensee on probation who has bilked advertisers of \$6,000 through fraud is entitled to another probationary term, Star Stations of Indiana, Inc., 19 F.C.C. 2d 991, 996 (1969). Commissioner Cox and I have tried, so far without success, to urge the application of some standards, however minimal, to the Commission's license renewal process. Renewal of Standard Broadcast and Television Licenses [Oklahoma], 14 F.C.C. 1 (1968); Renewal of Standard Broadcast and Television Licenses [New York-New Jersey], 18 F.C.C. 2d 268, 269, 322 (1969); District of Columbia, Maryland, Virginia, West Virginia Broadcast License Renewals, — F.C.C. 2d — (1969).

The industry's response to the initial WHDH decision, WHDH, Inc., 16 F.C.C. 2d (1969), and the increased effectiveness of public groups devoted to improving broadcasting has been confused and irrational, and of mixed impact on programming. The policy statement will remove much of this confusion.

The Commission has made it clear that it will not permit chaos to reign, that the better broadcasters have nothing to fear, and that all can get back to the task of programming their stations in ways that serve the awesome needs of the American people for quality entertainment, cultural enrichment, continuing education, and information and analysis about life in the communities and world in which they live. The more responsible broadcasters now know they will be protected from harassment from audience on FCC.

On the other hand, the public now clearly understands that a new day has dawned; licenses will not be automatically renewed; those licensees not offering substantial service are open to challenge.

The below-average broadcasters should respond to this new state of affairs by upgrading their programming from a minimal to a substantial performance. They now have a very real incentive to purchase this renewal insurance against the possibility of a challenge.

Moreover, the statement only relates to competing license challenges, not petitions to deny license renewals. Such petitions may still be filed and considered against any licensee. Their consideration in the future may very well be more rigorous than at present. No smart licensee will lightly risk walking too close to the cliff of minimal performance.

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And, of course, a competing license challenge may also be filed against any licensee in good faith, even though it ultimately may be rejected by an examiner. Only the broadcaster who is confident his performance is well above average can be assured of the outcome.

And, in the last analysis, as the statement concedes, its ultimate impact will only be known after the examiners, FCC and courts have processed some cases. No statements of policy can affect the FCC's will to act (or lack thereof) in deciding whether to deny license renewal in one-hundredth of 1 percent, one-tenth of 1 percent, 1 percent or 10 percent of the renewal cases coming before it. (With roughly 2,500 license renewals a year, these percentages are equivalent to one denial every 4 years, two or three a year, 25 a year and 250 a year, respectively.) No statement of policy can be the basis for predicting such percentages with any greater precision until the results are in.

There are legal and public relations considerations involved in issuing this statement as fait accompli rather than as proposed rule-making for public comment. I will not review the issues here, except to say that I think it would have been wiser, on such a controversial matter, to use the rulemaking procedure.

I cannot avoid reference, in passing, to the significance of this particular kind of necessary compromise with broadcasting's power. The record of Congress and the Commission over the years shows their relative powerlessness to do anything more than spar with America's "other government," represented by the mass media. Effective reform, more and more, rests with self-help measures taken by the public. Recognizing this, the broadcasters now seek to curtail the procedural remedies of the people themselves. The industry's power is such that it will succeed, one way or another. This is sad, because—unlike the substantive concessions it has obtained from Government from time to time—there is no turning back a procedural concession of this kind once granted. Not only can the industry win every ball game, it is now in a position to change the rules.

I have considerable sympathy and respect for my colleagues' commendable and good faith effort to resolve this conflict between formidable political power and virtually unrepresented public interest. They have tried. They really have. And it is not at all clear to me that more than they have done would have been politically possible, or could have withstood political appeal. It is not even clear that today's effort is secure.

Thus it is, with no feelings save understanding, frustration and sorrow, that I dissent.

22 F.C.C. 24

*Doesn't say it
was required*

F.C.C. 70-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Petitions Filed by
BEST, CCC, AND OTHERS

For Rulemaking to Clarify Standards in RM-1551

All Comparative Broadcast Proceed-
ings

MEMORANDUM OPINION AND ORDER

(Adopted January 14, 1970)

By the Commission: Commissioner Robert E. Lee concurring and
issuing a statement; Commissioner Johnson dissenting

1. The Commission has before it for consideration the petition for rulemaking filed on January 9, 1970, by Black Efforts for Soul in Television (BEST), Citizens Communications Center (CCC), William D. Wright, and Albert H. Kramer, to adopt a rule clarifying the standards to be applied in all comparative broadcast proceedings. The proposed rule would largely parallel the Commission's 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393. Petitioners further request an oral presentation before the Commission.

2. The Commission has this day adopted a policy statement concerning comparative hearings between regular renewal applicants and new applicants for the same facilities in the same community (F.C.C. 70-62). For the reasons set forth in that statement and those developed within, the Commission declines to grant the relief requested in the rulemaking petition.

3. First, we point out that petitioners are mistaken in their assertion that the policy statement just adopted reverses "the substantive law as it existed in 1965 and has been followed since" (Pet. p. 4). The 1965 statement (1 F.C.C. 2d 393) dealt with the comparative hearing involving only new applicants; it was expressly stated that a comparative hearing involving a renewal applicant presented a different situation (n. 1, 1 F.C.C. 2d at 393). Petitioners are correct that the 1965 statement was relied upon in subsequent proceedings, "including the WHDH decision" (Pet. p. 4). But the Commission has stated, both in the WHDH decision (WHDH, Inc. 17 F.C.C. 2d 856, 872-8 (1969)) and on other occasions (see statement of the Commission before the Senate Committee on Commerce, on Dec. 1, 1969, pp. 4-5), that this was because the WHDH case was not the usual comparative renewal case, but rather was of a sui generis nature due to the considerations set out in the above decision and statement at the above citations. The policy statement just adopted makes clear that in its central pronouncement, it is not making new law but rather following, to a substantial degree the long-established precedent of the *Hearst Radio* case, 15

21 F.C.C. 2d

F.C.C. 1149 (1951). In this respect, the policy statement also reflects the testimony presented by the Commission in the recent hearings on S. 2004 (see majority statement, *supra*).

4. Second, we have not followed defective procedures in adopting the policy statement. Indeed, we have followed precisely the same process as in the case of the 1965 statement. There, we examined past precedents and developed a statement setting forth the Commission's current policy on comparative hearings involving new applicants. We did not engage in public rulemaking proceedings. The area is simply not conducive to rulemaking. Rather, we have found it most appropriate to develop policies in ad hoc decisions, to clarify and refine such developments with an overall policy statement on appropriate occasions, and to stress the crucial importance of applying these policies to the particular facts of each case. 1 F.C.C. 2d at pp. 393-5, 399. The same considerations are applicable to the development of the policy statement on comparative hearings involving regular renewal applicants. Here again we believe it appropriate to set forth our policies, as largely developed over the years in cases, and indicate how we propose to apply these policies to the facts of particular cases as they arise. The rule proposed by petitioners is like no rule adopted or proposed in our very extensive regulations. Such a general discussion of policies is not, in our judgment, effective rulemaking.

5. It is, we believe, settled law that the agency may proceed either by rulemaking or by ad hoc development of policy. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947). Thus, we could develop all policy in this area in a single decision or a single designation order, such as the recent one in Boston, where we simply recited the applicability of *Hearst Radio* (*In re Application of RKO General, Inc.*, F.C.C. 69-1335, par. 8). But while policy can thus be developed in a single decision or order, its effect differs greatly from a rule. The latter definitively controls the hearing, unless a case can be made for waiver, and indeed may eliminate the need for any hearing. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). On the other hand, parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation.

6. We recognize that while rulemaking is inappropriate and there is no legal bar to proceeding by way of ad hoc policy development, with an accompanying policy statement reflecting such development, it may nevertheless be argued that opportunity for comments and oral presentation could be afforded prior to issuance of the policy statement. We do not believe that such process would serve any useful purpose here. Like the 1965 statement which was adopted without such procedures, this policy statement reflects lengthy administrative practice. It takes into account nuances caused chiefly by court decisions (see policy statement, p. 8). Further, we have had the benefit of recent extensive legislative proceedings in which a large number of interested persons set forth views on this specific area. Finally, parties may seek revision of the policy as cases come before the Commission, and may do so in the context of specific factual situations. Interested persons, such as petitioners, may seek to present their views in such cases as *amicus curiae*. If the requested policy changes are rejected, resort may be

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10 2004 2

had to the courts, if such rejection is believed unlawful, or to the Congress, if it is regarded as unsound policy. While, for all these reasons, we believe that further proceedings would not be helpful, it does serve the public interest to insure that our present policies, based largely on established precedents, are clearly stated. The policy statement does that.

7. We turn finally to the merits of the matter. No extended discussion is needed here. Rather, we rely upon the discussion in the policy statement. We would simply note that the policy adopted is a fair one, which serves the public interest "in the larger and more effective use of radio" (sec. 303(g) of the Communications Act). It does not, by administrative fiat, grant "broadcast licenses in perpetuity" or " * * * arbitrarily restrict the rights of access of present and potential applicants to the limited number of radio and television frequencies * * *" (Pet., p. 5). It fully recognizes and implements the statutory scheme of a competitive spur by permitting the filing of competing applications at renewal time. Thus, it expressly states that any interested persons who believe that an existing licensee has not, in its last license term, provided substantial service, without serious deficiencies, may file a competing application and will be given a full opportunity to establish that crucial fact in a hearing. If, on the other hand, the existing licensee establishes in the hearing that it has provided such service, then its license will be renewed over the promises of the newcomer. To reward good solid service to the public with a denial of renewal would undermine the stability of the broadcast industry and in turn disserve the public interest. For the same reason, it is simply not appropriate to use the renewal process to restructure the broadcast industry; this is, rather, a matter for general rulemaking proceedings, several of which are presently pending before us.

Accordingly, *It is ordered*, this day of January 14, 1970, that the above described petition for rulemaking *is dismissed*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WADE, Secretary.
(1970, 11, 14, 1970, 11, 14)

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur. I think that the majority in the *WHDH* case (16 F.C.C. 2d 1) did create great confusion as to the applicable comparative criteria involving cross filings against renewal applications. I have already set out my reasons in support of this belief (*WHDH* 16 F.C.C. 2d 1, 24) but I fully concur for the reasons stated in this memorandum opinion and order in a denial of the petition for rulemaking.

21 F.C.C. 2d

F.C.C. 70-738

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
POLICY STATEMENT ON COMPARATIVE HEAR-
INGS INVOLVING REGULAR RENEWAL APPLI-
CANTS

In Re Petitions Filed by
BEST, CCC, AND OTHERS
For Rulemaking To Clarify Standards in
all Comparative Broadcast Proceedings

RM-1551

MEMORANDUM OPINION AND ORDER

(Adopted July 8, 1970; Released July 21, 1970)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONER
JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. On January 15, 1970 the Commission released a *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 35 F.R. 822, in which we set forth the approach we intend to follow in comparative broadcast hearings where a new applicant challenges a licensee seeking a renewal of license. The next day we released a Memorandum Opinion and Order adopted January 14, 1970 in RM-1551, 21 FCC 2d 355, dismissing a petition for rule making filed by BEST (Black Efforts for Soul in Television), CCC (Citizens Communications Center), William D. Wright, and Albert H. Kramer in which the petitioners proposed a new rule to clarify the standards in all comparative broadcast hearings, including contests on renewal, along the lines of our 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. We now have before us petitions for reconsideration of the January 15, 1970 policy statement filed by BEST, *et al.* (BEST), and (jointly) by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc. BEST has also filed a petition "for repeal" of the policy statement and a third petition, to reconsider the dismissal of the BEST petition for rule making; these pleadings are based upon the memorandum submitted with the petition to reconsider the policy statement. The petitions are opposed by several other licensees, and replies have been received.

2. Our January 15, 1970 policy statement set forth our proposed approach to the disposition of broadcast hearings involving contests between new applicants and regular renewal applicants. It followed and supplemented our 1965 policy statement on comparative broadcast hearings between new applicants for the same facilities. Several of the objections raised to the 1970 policy statement were treated in the opinion on BEST's petition for rule making. Thus, as we there made

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clear, the policy statement was not a rule and did not have the force or effect of a rule; consequently, as we stated, "parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation." (21 FCC 2d at 336.)¹ Therefore, we must reject the contention that the adoption of the policy statement contravenes the rule making requirements of the Administrative Procedure Act. That statute specifically makes its notice requirements inapplicable to "general statements of policy."² 5 U.S.C. § 553(b). That the policy statement expresses our views on matters of substance of course does not take it out of the statutory exemption nor, in light of the further exemption for rules of procedure, does the fact that it contains a procedural element. Substantive rules must be preceded by notice and comment. Substantive policy statements need not be. While we understand that the parties seeking reconsideration do not agree with our view that the policy statement contains a unified expression of policies largely formulated in earlier adjudicatory cases, their argument still misses the point that it is only a policy statement—subject to full reargument in individual cases—with which we are dealing. Although, in view of these considerations, we do not believe that a petition for reconsideration properly lies under Section 405 of the Communications Act, it nevertheless seems desirable to consider the contentions put before us.³

3. It is urged that there is no support in fact for the weight we have given to stability and predictability in station operation. But we think it is amply clear that in an industry requiring substantial investments, often with long periods of financial loss, the public interest is served by a reasonable assurance that good public service will constitute a protection against a complete loss of the business. In this connection, we point out that Hampton Roads and Community are incorrect in their assertion that we have required a successful challenging applicant to purchase the facilities of the incumbent licensee. We said that it would be expected that arrangements could and would be made to purchase the facilities of the existing station, but we have not imposed any such requirement.⁴ It is no answer to this problem that many stations are profitable, even highly profitable, for not only do many stations have unprofitable operations for substantial initial periods, but for all stations we can only expect the required initial and continuing investments if there is a reasonable expectation, consistent with the overriding requirements of the public interest, that the station will be treated as a going business. And, certainly, it would make no sense to apply the policy statement only to losing operations and to deny its benefits to any existing station which is operating in the

¹ Even in the case of a rule, parties are allowed to make a showing why the rule should be waived in a particular case. See *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 204-205; Section 1.3 of our rules, 47 CFR 1.3. A fortiori, a party may show why a policy should not be applied in his fact situation. In short, the touchstone for all Commission action remains the public interest, and therefore, the Commission must be alert to a showing that the public interest would be served by action different from that embodied in any general rule or policy.

² Taking into consideration that we are not adopting a binding rule and that these matters may be reopened in particular cases, we do not believe that oral argument is either appropriate or required.

³ We note also that purchase of physical facilities will not provide recompense for operating costs.

black. This would hardly be an inducement to good operation. In short, a contrary policy would, we believe, result in a chaotic situation wholly at odds with the Congressional purpose in creating this agency and its predecessor.

4. As mentioned above, we have attempted to provide stability only insofar as it is consistent with the paramount public interest, and have given no advantage to any existing licensee who is qualified but only barely so. We have given up the fullest advantages of competition only in favor of continuance of a solid measure of performance without substantial defects. We have, however, maintained the competitive spur of the statutory scheme by not only permitting but encouraging competing challenge to renewal applicants who are believed to have only minimally served the public interest. And to make this policy effective, we have precluded "upgrading," either after the competing application is filed or during the third year of the license term because of the imminence of public challenge.⁴ This, we stress, is a reasonable balancing of two considerations—the desirability of stability and the competitive spur of challenge—which best serves the public interest. It is said, nevertheless, that any such balancing is forbidden by the Communications Act as already interpreted by the courts, and that nothing short of a full comparative hearing involving all factors will suffice. We do not so read the statute. The cases relied upon all deal with initial applications and do not reach the question of whether it is permissible or, as we believe, necessary to give special weight to a solid record of performance in the renewal situation. The question is one of substantive policy, since our instruction to the examiners on the conduct of the hearing is peripheral procedure. If the policy is reasonable, and we have set forth our reasons for adopting it, we see no merit to the contention that it creates a right in the frequency or its use beyond the terms of the license (see Sections 301, 304, 307(d), 309(h), 47 U.S.C. 301, 304, 307(d), 309(h)). The assignment of conclusive weight to a solid record of operation in the public interest is not the grant of a right to future use based upon past occupancy of a channel. As we have made amply clear, past occupancy by itself is irrelevant under our policy statement. But there is nothing in the Communications Act that prohibits the assignment of different weights to different public interest factors in this situation, or the assignment of conclusive weight to a factor we find to be determinative in its relationship to the public's interest in future use of the frequency or channel. While this policy may eliminate a direct comparison between applicants on factors such as integration of ownership with management and diversification of control of the media of mass communications, it does not sanction a grant to any renewal applicant

⁴In this connection, we note that our assignment and transfer forms require a showing as to the programming performance of the assignor or transferor, when an assignment or transfer is sought more than 18 months after the last renewal. This is intended to insure that the transferor has not ignored his renewal commitments in anticipation of sale. Thus, we would not permit transfers during the last 18 months of a license period where the transferor's operation raises a substantial question of basic qualification because of a failure to adhere to promises (or of course for any other public interest reason coming to our attention at any time). This is not new policy, cf. *Jefferson Radio Co. v. Federal Communications Commission*, 119 U.S. App. D.C. 256, 340 F.2d 781 (1964), but it seems desirable to reiterate it here.

who is disqualified in any respect, or in the face of a competing challenger, who is not substantially serving the public interest. Barring an unusual showing, it eliminates a comparison but does so upon a basis rooted in actual operation of the facilities in question. The Constitution is obviously not affronted by this policy if we are correct in our judgment that it is a policy reasonably calculated to best serve the public's interest. *National Broadcasting Co. v. United States*, 319 U.S. 190.⁵

5. We have carefully considered the arguments contained in the petitions before us and we are not convinced that our announced policy on comparative renewal proceedings is either illegal or unwise. Of course, those adversely affected may raise any relevant contention in individual proceedings, where they will be examined *de novo*. However, it should be useful to all parties concerned to have the Commission set forth the overall views to which its experience has led it. Finally, we stress again what we said in concluding our 1970 statement:

In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

6. For the foregoing reasons, the petitions before us ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I dissent to the denial of these petitions for reconsideration on three grounds: The Commission's January 15, 1970 Policy Statement (1) violates Section 4 of the Administrative Procedure Act (5 U.S.C. Section 553) or, at least, is an abuse of agency discretion; (2) violates Section 309(e) of the 1934 Communications Act; and (3) violates the First Amendment to the United States Constitution.

The Administrative Procedures Act (APA) requires the Commission to follow certain procedures (notification, opportunity to file comments, etc.) in all cases of administrative "rule making." Section 2(c) of the APA defines a "rule" as:

... the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency

Section 4(a) of the APA, however, exempts from rule making:

... interpretative rules, general statements of policy, rules of agency organization, procedure, or practice

⁵ See also *Hale v. Federal Communications Commission*, — U.S. App. D.C. —, — F. 2d — (No. 22,751, February 16, 1970), holding that issues of concentration of control applicable to the industry as a whole and involving an overhaul of multiple ownership policy, may appropriately be reserved for treatment in general rule making.

The majority argues that the January 15, 1970 Policy Statement is an exempted "general statement of policy" under Section 4(a), and not subject to the safeguards of Section 4. Although the legal precedent on this question is by no means clear, I believe there are valid reasons for disagreement.

The rule making safeguards of the Administrative Procedure Act were clearly designed to limit the discretion of federal agencies in their legislating function—that is, the adoption of substantive rules or general schemes of administration to affect differing groups or individuals across-the-board. In delegating its legislative authority to non-elected bodies of men not directly responsible to the electorate, I do not believe that Congress intended to cast this and other agencies adrift on the limitless sea of their own unbounded discretion, able to enact substantive rules at will (under the guise of "policy statements") without due consideration of interested parties' views. This, at any rate, appeared to be the position of Attorney General Francis Biddle who gave the following interpretation of "policy statement" in a 1941 Report:

[A]pproaches to particular types of problems, which as they become established, are generally determinative of decision As soon as the "policies" of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that may advantageously be brought to public attention by publication in a precise and regularized form.

Report of the Attorney General's Committee on Administrative Procedures, S. Doc. No. 8, 77th Cong., 1st Sess., pp. 26-27 (1941). In other words, certain procedural safeguards exist to protect the public in formal rule making and adjudication; once law has been established through these procedures, however, the agency may explain it to the public through "policy statements."

Procedurally, at least, this Commission could have addressed the substance of its Policy Statement through adjudicatory or rule making proceedings—both of which contain the safeguards of the adversary process. Arguably, however, it cannot do so without any procedural safeguards at the time of adoption, as it has attempted here. *Cf. Moss v. Civil Aeronautics Board* — F.2d — (D.C. Cir., July 9, 1970). There must be some logical and legal distinction between a "rule" and a "policy statement." An administrative agency is apparently not free to characterize its action in any way it sees fit:

The particular label placed on it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.

Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942). The appropriate distinctions may well turn on whether the agency takes action affecting a change in substantive legal rights (through a rule on adjudication), or whether the agency's action merely explains or interprets existing policies or decisions previously enacted through proper legal procedures (a policy statement). Thus, the Commission can issue a "Public Notice" through its Office of Information, explaining or summarizing the import of a particular rule; but it cannot adopt that rule, without procedural safeguards, merely by captioning its document a "Public Notice" and pretending that no substantive change in the law is involved.

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The issue here, therefore, turns on whether the January 15, 1970 Policy Statement effected a substantive change in our comparative renewal standards. I frankly do not think even the majority can seriously contend that the Commission has not substantially changed its hearing procedures in comparative renewals by its January 15, 1970 Policy Statement. We have designated many cases for comparative hearings since the *Hearst* case, yet we have never even suggested to the Examiner that he first determine whether the incumbent licensee "has been substantially attuned to meeting the needs and interests" of the community. Indeed, we have recently reimbursed Voice of Los Angeles, Inc., for costs incurred during the initial portions of a comparative challenge to the license of KNBC, Los Angeles, essentially on the ground that our January 15, 1970 Policy Statement came as an unannounced surprise to Voice, and that given the change in policy it would be inequitable not to permit them to withdraw. *National Broadcasting Co., Inc. (NBC)*, FCC 70-691 (Docket No. 18602) (released July 7, 1970). Prior to January 15, 1970, no communications lawyer or even FCC Hearing Examiner would have dreamed that a competing application would not even be considered if the incumbent licensee met certain programming standards. Accordingly, we must conclude that a substantive change in law has been made, and the rule making procedures of the APA should apply.

Even if action by policy statement is a legally available option to the Commission in this case, I believe the Commission has abused its discretion by so acting without clearly articulated reasons. In dismissing petitioners' request for rule making. *Petitioners by BEST*, 21 F.C.C. 2d 355 (1970), the Commission cited *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947), for the proposition that the Commission has the discretion to choose between adjudication and rule making. The Commission, however, does not attempt to explain why the use of a policy statement in this case was *preferable* to the use of adjudication and rule making. Rather, it simply asserts that it had the *power* to act without the usual procedural safeguards. Even conceding that the Commission has this power, it must exercise its discretion in a rational way in an opinion explaining its reasoning. Even *Chenery* recognized that agency discretion was limited by certain fundamental standards of fairness.

The Commission's Policy Statement decision cannot be considered "reasonable" or "fair"—particularly in view of the political events surrounding its adoption. Following the decision in *WHDH, Inc.*, 16 F.C.C. 2d 1 (1969), the broadcasting industry sought to obtain from Congress the elimination or drastic revision of the comparative hearing procedure. See, e.g., *Hearings on S. 2004 [Orderly Renewals] Before the Subcommittee on Communications of the Senate Committee on Commerce*, 91st Cong., 1st Sess. ["The Pastore Bill"] (Dec. 1, 1969). Although more than 100 Congressmen and 23 Senators quickly announced their support, a number of citizens groups testified that S. 2004 was "back door racism" and would exclude minorities from access to media ownership in most large communities (Black Efforts for Soul in Television), would perpetuate excessive concentrations of control (National Citizens Committee for Broadcasting), and would remove

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"competition" from broadcasting and "freeze out every underrepresented class in American Society" (American Civil Liberties Union). See *Hearings on S. 2004, supra*.

The impact of citizen outrage measurably slowed the progress of S. 2004, and many Senate observers began to predict the Bill would never pass. Then, without formal rule making hearings, or even submission of written arguments, the Commission suddenly issued its January 15, 1970 Policy Statement—achieving much of what Congress had been unable or reluctant to adopt.

There were many parties who had invested substantial time and money fighting the threatened diminution of their rights, and who no doubt would have opposed our January 15, 1970 Policy Statement on numerous grounds. In challenging S. 2004, many of these parties claimed to represent the interests of important segments of our population: the minorities, the poor, and the disadvantaged. By refusing even to listen to their counsels, this Commission reached a new low in its self-imposed isolation from the people; once again we closed our ears and minds to their pleas. See, e.g., *National Broadcasting Co.*, 20 F.C.C. 2d 58 (1969); *KSL, Inc.*, 16 F.C.C. 2d 340 (1969); *Office of Communication of the United Church of Christ [WLBT-TV]*, — F. 2d —, No. 19,409 (D.C. Cir., June 20, 1969), and 359 F. 2d 994 (D.C. Cir. 1966).

The majority argues for the Policy Statement's validity by contending that it is "only a policy statement" which may be fully reargued in future cases when it is applied. This argument is invalid. For one thing, the mere existence of the Policy Statement will deter groups that otherwise might have entered comparative contests. Between *WHDE, Inc.* and our Policy Statement, a number of applicants filed competing license challenges with the Commission. To my knowledge, not one TV application has been filed since January 15, 1970—and one major applicant has even withdrawn on the basis of our Policy Statement. See *National Broadcasting Co., Inc. (KNBC)*, FCC 70-691 (Docket No. 18602) (released July 7, 1970). In addition, our Policy Statement will doubtless be applied to future cases without exception. No man is likely to reverse himself once he has announced his decision in public, and no one seriously believes that applicants will be able to reargue the merits of our January 15, 1970 Policy Statement and obtain an impartial and open-minded reception. As in *Moss v. Civil Aeronautics Board*, — F. 2d —, (D.C. Cir., July 9, 1970), the basic decisions have been made *ex parte* in "closed sessions," and there is little anyone can do to re-open them.

Finally, the Commission's abuse of discretion becomes particularly severe in light of the First Amendment questions discussed below. Whatever discretion the Commission may have to choose various procedural modes in other cases, that discretion must be narrowly limited where it results in a curtailment of speech freedoms. Our failure to follow normal rule making procedures, therefore, is an abuse of agency discretion and cannot be justified by the principles of *Chenery*.

The January 15, 1970 Policy Statement also violates, in rather clear fashion, Section 309(e) of the 1934 Communications Act. That Section provides that if the Commission cannot find that the grant of any

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particular license application will serve the "public interest, convenience, and necessity," it must designate the application for "a full hearing in which the applicant . . . shall be permitted to participate." In other words, the Commission must either grant a license application, or provide the applicant with a full hearing on the merits. Thus, where an incumbent licensee is challenged by an otherwise acceptable new applicant, Section 309(e) bars rejection of the competing application without a hearing. Yet this rejection is precisely what will happen under the Policy Statement when the Examiner finds the incumbent "substantially attuned" to community needs and interests. In *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the FCC granted one of two mutually exclusive applications and designated the other for hearing. The Supreme Court reversed, saying:

We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing. We think that is the case here. (326 U.S. at 330.)

As *Ashbacker* said, "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333. Although *Ashbacker* involved competing applications for a new facility, its reasoning is equally applicable here. Even *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), and *Wabash Valley Broadcasting Corp.*, 84 F.C.C. 677 (1963), which the Commission cite to support its January 15, 1970 Policy Statement, granted both applicants a full hearing on all issues involved. I believe Congress intended in Section 309(e) to give new applicants with allegedly improved programming proposals at least a hearing to prove their claims. The Commission's Policy Statement eliminates this right.

Finally, I believe the January 15, 1970 Policy Statement imposes burdens on freedom of speech which are inconsistent with the First Amendment. Freedom of the press, for example, must do more than protect newspaper publishers from government censorship; it must also ensure that access to ownership of the print media is not blocked. Freedom of the press would not exist in this country if the government, while refraining from direct censorship over newspaper content, made it excessively difficult for people to own, control or publish a newspaper. The Supreme Court has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 20 (1945). And in *Red Lion*, the court said:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).

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Although the Commission's Policy Statement is ostensibly grounded in economic considerations, it undeniably impedes access to ownership of the broadcast media, and is therefore deeply imbued with First Amendment considerations. Upon review of agency and Congressional action, the Supreme Court will generally pay great deference to administrative and legislative expertise and experience in matters involving economic regulation, see *e.g.*, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); but it has clearly warned that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments" *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Because the First Amendment freedoms of speech and the press occupy a "preferred position" in the spectrum of constitutionally guaranteed liberties, *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949), see *Saia v. New York*, 334 U.S. 558, 562 (1948); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552-53 (1876), the government must prove that a "compelling," *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), or "paramount," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), governmental interest exists to justify restrictions upon First Amendment freedoms.

I think it is obvious that the Commission has made no "compelling" or "paramount" showing of necessity for the doctrines adopted in its January 15, 1970 Policy Statement. We have taken no hard economic evidence on the issue; we have consulted directly with neither licensees nor the public on this issue; and we have considered no alternatives to this scheme of regulation.

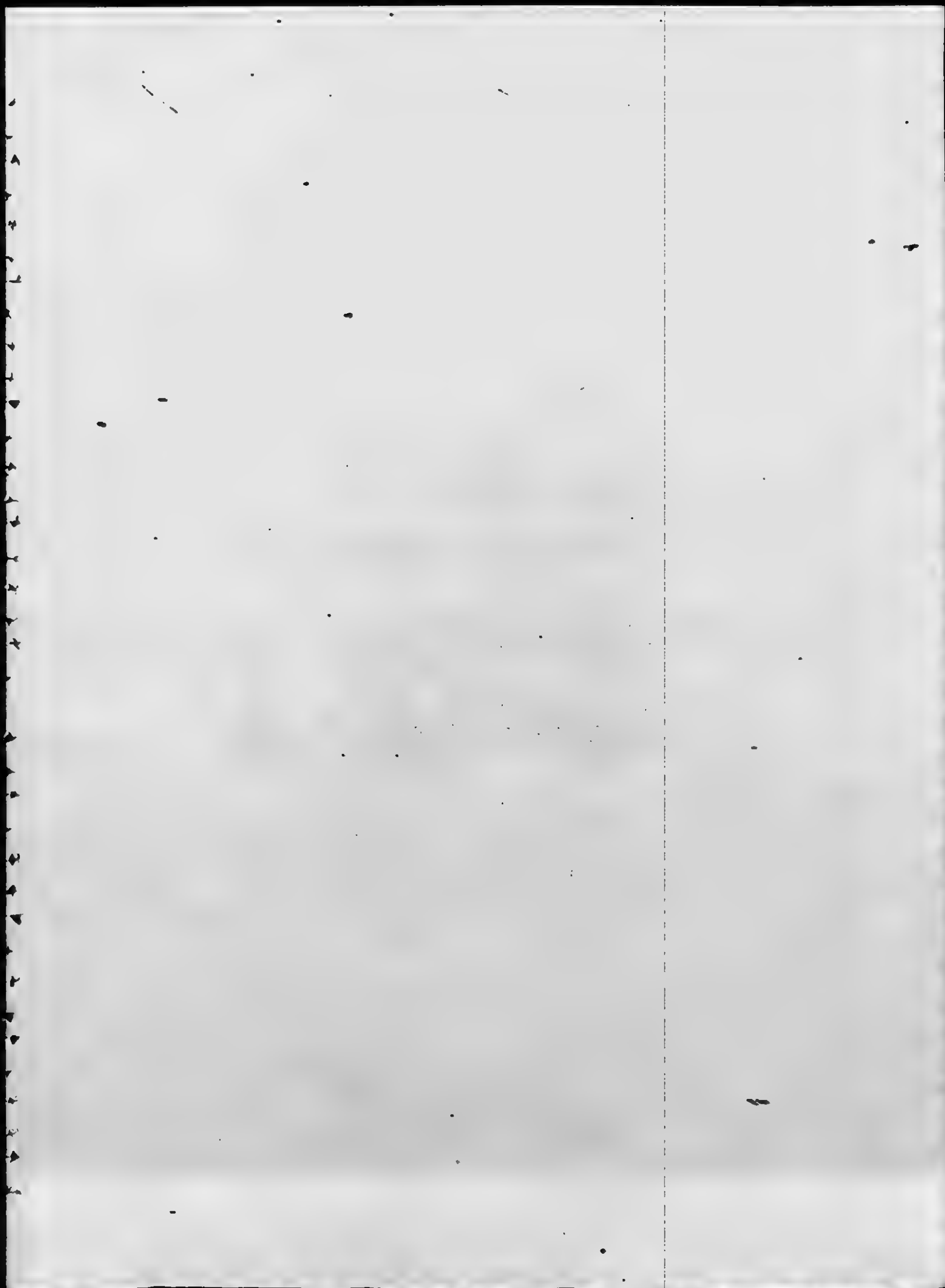
The Supreme Court has also indicated in First Amendment cases that legislative bodies must use "less drastic means" of regulation whenever possible to create the least interference with individual liberties, *E.g.*, *United States v. Robel*, 389 U.S. 258, 268 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see generally, Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969); Wormuth & Merkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254, 267-93 (1964). If the Commission is concerned that the scheme of competitive applications established by Congress in 1934 is unduly severe on the broadcasting industry, and that "stability and predictability in station operation" is needed to safeguard its "financial investments," then there are clearly "less drastic means" for accomplishing this goal than eliminating altogether potential licensees who might better serve their communities. The FCC, for example, might give losing incumbent licensees a tax certificate entitling it to involuntary conversion treatment under Section 1033 of the Internal Revenue Code. Another possibility would be to require the winning applicant to reimburse the losing incumbent for the fixed costs of his investment—or perhaps even his programming investments during the past two or more years. The point, simply, is that there are any number of alternative ways to increase stability in the broadcast industry without substantially impeding the access of various groups to ownership.

The importance of the First Amendment in this proceeding is three-

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fold: First, the restrictions the Commission has placed on entry into the broadcasting field may well violate the standards of the First Amendment; second, the significant involvement of First Amendment issues in the comparative renewal procedure places on this Commission a greater burden of justifying its action than it has met; and third, the First Amendment considerations should limit the discretion of this agency to adopt substantive rules without the safeguards of the Administrative Procedure Act. We may be able to justify purely economic regulations by our alleged fund of "accumulated experience"; but we must do more when we curtail access to media ownership. We must demonstrate a "compelling" need for these regulations, and that there are no "less drastic means" available to us. This we have clearly failed to do.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,221

Citizens Communications Center, et al., Appellants

v.

Honorable Dean Burch, Chairman Federal Communications
Commission, et al., Appellees

No. 24,471

Citizens Communications Center, Black Efforts for Soul
in Television, Albert H. Kramer, William D. Wright,
Petitioners

v.

Federal Communications Commission and United States
of America, Respondents

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONERS

United States Court of Appeals
for the District of Columbia Circuit

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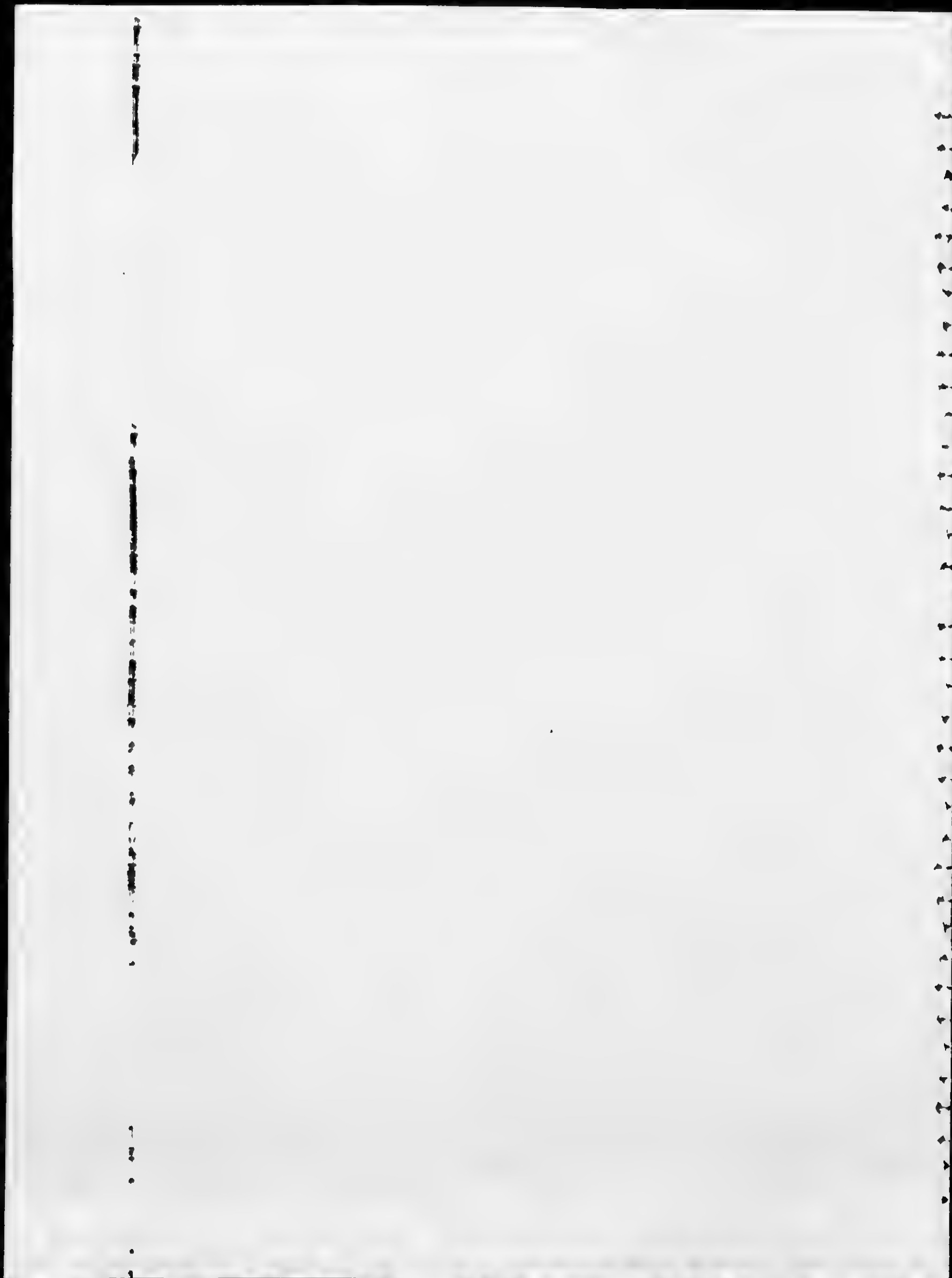


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- Baker and Ball, Violence and the Media (A Task Force Report to the National Commission on the Causes and Prevention of Violence) (1970)..... 38
- Barron, An Emerging First Amendment Right to Access to the Media, 37 Geo. Wash. L. Rev. 487 (1969).... 33, 38
- Barron, Access to the Press: A New First Amendment Right, 80 Harv. L. Rev. 1941 (1967)..... 33
- Comment, The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity, 118 U. Pa. L. Rev. 368 (1970)..... 11, 13, 15
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- Wormuth and Merkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964)..... 35, 36

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- F.C.C. BCPT 4346, Jan. 2, 1970
- F.C.C. BCPT 4303, Nov. 3, 1969
- Broadcasting Magazine, Dec. 29, 1969, p. 5.....13,
- National Broadcasting Co., Inc. (KNBC-TV), Docket No. 18602, Joint Petition for Approval of Agreement (Feb. 13, 1970).....
- F.R.C., Second Annual Report to Congress, Oct. 1, 1928.....
- United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort (1970).....

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FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONERS

JURISDICTION

This brief is submitted in support of petitioners' appeal from the judgment of the District Court dismissing petitioners' complaint for want of jurisdiction, and in support of petitioners' petition for review of an order of the Federal Communications Commission (hereafter "FCC" or "Commission") denying petitioners' petitions to the FCC for reconsideration and repeal of an FCC Statement of Policy and for reconsideration of the FCC's denial of petitioners' petition for rule making. This Court has

jurisdiction of the appeal from dismissal of the complaint pursuant to 28 U.S.C. § 1291. It has jurisdiction of the petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

The two proceedings have been consolidated for all purposes by order of this Court issued September 9, 1970 and have been further consolidated with No. 24,491, Hampton Roads Television Corp., et al. v. F.C.C. by order of this Court issued September 29, 1970.

STATEMENT OF ISSUES

1. Does the FCC Policy Statement, J.A. 5, deprive a new applicant for an existing broadcast license of a full comparative hearing on the merits of his application?
2. Does the Communications Act of 1934, 47 U.S.C. §§ 307-309, require such a hearing?
3. Does the FCC Policy Statement violate the Communications Act and usurp the legislative power of Congress?
4. Does the FCC Policy Statement inhibit access to a mass media voice in violation of the First Amendment to the Constitution?
5. Does the FCC Policy Statement choke off the opportunity of minority groups to gain access to a mass media voice in violation of the Equal Protection Clause of the 14th Amendment to the Constitution?

STATEMENT PURSUANT TO RULE 8(d)

This case has not previously been before this Court.

REFERENCES TO RULINGS

The rulings of the FCC that are challenged in this appeal are

(1) Policy Statement on Comparative Hearings Involving Regular Renewal Applicants (hereafter the "Policy Statement"), dated January 15, 1970. It is reported at 22 F.C.C. 2d 424 (1970), J.A. 5-14.

(2) Memorandum Opinion and Order (denying petitioners' petition for rule making) adopted January 14, 1970 and released January 16, 1970. It is reported at 21 F.C.C. 2d 355 (1970), J.A. 15-17.

(3) Memorandum Opinion and Order (denying petitioners' petitions for reconsideration and repeal of the Policy Statement and for reconsideration of the denial of the petition for rule making) adopted July 8, 1970 and released July 21, 1970. It is reported at 24 F.C.C. 2d 383 (1970), J.A. 18-27.

STATEMENT OF THE CASE

Introduction

The petitioners here, Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST) are non-profit organizations. They are organized for the purposes of improving radio and TV service, of promoting the responsiveness of broadcast media to their local communities of improving the position of minority groups in media ownership, access and coverage, and of generally presenting a public voice in proceedings before the FCC. They have appeared and are appearing in numerous proceedings before the FCC and in other appeals in this Court from FCC rulings.*

This appeal is illustrative of the manner in which the FCC proceeds when it has determined to subordinate the interest of the public, which it is supposed to serve, to the clamor of the broadcasting industry, which it too often heeds.

The issue in this appeal is the extent to which a broadcaster holding a license to pre-empt the airways shall be insulated

*Petitioner CCC has provided assistance to individuals and citizen groups ranging from national organizations, e.g., Southern Christian Leadership Conference, petitioner BEST, to local coalitions of groups in cities such as San Francisco, Atlanta, Mobile, and Birmingham in both rulemaking, e.g., Primer on Ascertainment of Community Problems by Broadcast Applicants, Docket No. 18774, and adjudicatory, e.g., Chronicle Broadcasting Co., Docket No. 18500, Alabama Educational Television, Files Nos. BRET-5, BRET-7, BRET-14, BRET-69, BRET-87, BRET-109, BRET-130, BRET-147; WALA-TV, BRCT-231, proceedings. Its attorneys are currently representing citizen groups in two other cases pending in this Court. Business Executives Move For Vietnam Peace v. FCC, No. 24,292; Green v. F.C.C., No. 24470.

Petitioner BEST has appeared in rulemakings before the Commission, e.g., Ascertainment of Community Problems by Broadcast Applicants, Docket No. 18774, and has been a party in adjudicatory proceedings, e.g., Alabama Educational Television, supra. It has provided technical assistance to black groups across the country in their efforts to gain equitable treatment from the media.

from having to meet a challenge to his stewardship when, as Congress provided, his three-year term has expired and the FCC must decide whether to renew his license or to award it to another. At stake here is the institution of the adversary comparative hearing, for over 40 years the preferred tool of Congress to test the comparative qualifications of a broadcast licensee and a competing applicant for the license. The question is whether the FCC may now in effect abolish this procedure by fiat.

Since the beginnings of broadcasting, Congress has repeatedly and expressly declared that a broadcast license shall not be a monopoly in perpetuity. Broadcasters for their part have sought to maintain in perpetuity the exceedingly valuable monopoly that is the exclusive privilege to broadcast on one of the limited number of radio or TV frequencies. The intent of the Congress remains in the silent statute books; the broadcasters daily whisper in the corridors of the Commission. The Policy Statement challenged in this appeal represents the FCC's final capitulation to the industry.

We trace the history of this near half-century of war in order to set today's battle in context.

The Original Understanding:
The Federal Radio Act of 1927

The first national effort at comprehensive regulation of broadcasting was the Federal Radio Act of 1927, 44 Stat. 1162 (1927). The Act was intended to ensure that "the broadcasting privilege will not be a right of selfishness" but would "rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (Representative White, House floor manager).

Assurances were given that by the Act the Congress had "undertaken to deny the right to acquire a vested right in the ether," 68 Cong. Rec. 2869-70 (1927) (Senator Borah). It was made clear that although granted a license for a specific term, it could not "be contended by anybody that at the expiration of the period of that license he has any vested right...". Id. at 2871 (Senator Walsh).

Hence the Act provided for expiration of licenses, and the possibility of renewal, every three years, Federal Radio Act, § 9, 44 Stat. 1166 (1926). The basic standard of "public interest, convenience and necessity" was to be applied to both initial licensing and renewal. Id. §§9, 11, 44 Stat. 1166, 1167 (1927). At license renewal time the licensee was to "come in and de novo meet all of the terms and conditions of the Act" before "the new licensing authority," the Federal Radio Commission. 69 Cong. Rec. 5115 (1928) (Representative White).

The tool for carrying out this task was the now familiar comparative hearing, in which the current licensee and a new applicant display their wares on the record and the Commission chooses between them who is to have the privilege to broadcast on a frequency for the next three years. In 1928 the Federal Radio Commission reported to the Congress on its interpretation of the Act's "public interest, convenience and necessity" standard. The Commission would consider the licensee's "character," his "financial responsibility" and his experience (i.e., past performance) in order to determine if "...he is more or less likely to fulfill the trust imposed by the license than others who are seeking the same privilege from the same community, state or zone..." The test was

a matter of comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the Commission must determine from among the applicants before it which of them will, if licensed, best serve the public. Federal Radio Commission, Second Annual Report to Congress, Oct. 1, 1928, p. 169 (emphasis added).

Applicability of this obligation to license renewal was made explicit in the Communications Act of 1934, §307(d), which amended §11 of the 1927 Act by adding:

...but action of the Commission with reference to the granting of such application for renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications. 48 Stat. 1084 (1934).

Taken literally this would mean that a licensee's past performance could not be considered at renewal time. In the depression years, there was little concern; the Commission had little occasion to apply §307(d). Then came the end of World War II and the development of commercial TV. The industry began to fear that §307(d) might pose a threat to the now more valuable broadcasting privilege and the larger TV investment. It therefore sought an amendment to §307(d), and in 1952 Congress deleted the provision subjecting renewal applications to "the same considerations" as original applications. It substituted the provision of the 1927 Act subjecting renewal and original applications alike to the standard of "public interest, convenience and necessity."

The amendment meant that the Commission could give a licensee consideration based on past performance. But it did not, despite efforts by industry, relieve the licensee of having to participate in a comparative hearing with a challenging applicant.

One industry witness, Joseph Ream, a CBS Vice-president, argued that the amendment meant to him that the Commission would have to determine first that the existing licensee had not served the public interest before considering a competing application. This colloquy ensued:

Mr. Bennett: If the section [307(d)] is to do what you say it is in your statement, then it seems to me some supplemental language should be written in so that there would not be any doubt about it.

Mr. Ream: If there is any doubt about it I am in favor of the supplemental language.
Hearings on S.658 before the House Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 325-26 (1951).

The language he sought was not added. Members of the Commission opposed such an amendment or such an interpretation. They urged that a comparative hearing was the only fair and practicable way to handle competing applications at renewal time.
Hearings, supra at 195 (Comm'r Jones), 242 (Comm'r Hyde).

In summary, in 1952 the road was made easier for the incumbent licensee; he was given a preference over a new, untried applicant. But the critical procedure of a comparative, adversary hearing in which he was required to measure his qualifications against those of his competitor was reaffirmed.

Case-by-Case Development of Standards

With the enormous success of the broadcast media after World War II, the FCC found itself having to develop standards for choosing among competitors seeking the quickly diminishing number of available frequencies. In a series of comparative hearing decisions--adversary adjudications, on the record--the FCC developed a set of criteria that renewal and new applicants

alike had to meet, and the benchmarks for measuring how well each met the criteria. As developed, these criteria were principally:

1. Past broadcast record of the licensee;
2. The desirability of diversification of the ownership of mass communications media;
3. Integration of ownership with management--owner, not absentee, operation of the station;
4. Proposed program service--the mix among news, public service, religious, entertainment and other types of programming.
5. Financial qualifications.
6. Character.

Other matters were also considered in specific cases.

In comparative hearings the FCC would weigh competing applicants' relative qualifications on each of these criteria and reach a judgment on each application as a whole as to which applicant would best serve the public interest.

For years the Commission's rulings favored incumbent licensees in the favorable weight given their past broadcast records. In Hearst Radio Inc. (WBAL), 15 FCC. 1149 (1951) the Commission ruled that the incumbent's record of past programming performance and the improbability that the challenger would be able to carry out its program proposals were enough to overcome the incumbent's demerits on other comparative criteria. In Wabash Valley Broadcasting Corp., 34 F.C.C. 677 (1963), the Commission demanded that a newcomer seeking to oust an incumbent must make a showing of superior service and must have some preference on the other comparative criteria.

Nonetheless the Commission (as the Supreme Court had instructed it in Ashbacker Radio Corp v. F.C.C., 326 U.S. 327 (1945), p. 22 infra) continued to reaffirm the need for a full comparative hearing. In Seven (7) League Productions, Inc., 1 F.C.C. 2d 1597 (1965), the Commission made it clear that all comparative criteria were applicable to all comparative proceedings. It ruled in this record adversary proceeding that the criteria set forth in its Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965), should be applied in renewal proceedings, overruling a footnote in that Policy Statement. This seemed to suggest a more critical attitude towards incumbents.

Then, in WHDH, Inc., 16 F.C.C. 2d 1 (1969), the Commission ruled that where a licensee's programming service had "been within the bounds of the average," he was entitled to no preference over a competing applicant. Finding that the WHDH licensee did not pass muster on other comparative criteria, the Commission awarded the license to a competing applicant.

In WHDH the Commission stated its intention to insure that "the foundations for determining the best practicable service, as between a renewal and a new applicant, are more nearly equal at their outset." 16 F.C.C. 2d at 10. For the first time in its history it had applied the comparative criteria in a renewal proceeding to award a license to the new applicant.

The Pastore Bill

This award caused consternation in the broadcast industry. Security of all licenses was claimed to be threatened.

First resort was to the Congress. "Even before the Commission had acted on the parties' motions for reconsideration in WHDH, the broadcasters' lobby had garnered considerable support for a major amendment of the Communications Act to make licensees virtually unassailable by competing applicants." Comment, The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity, 118 U.Pa.L.Rev. 368, 392 (1970). The medium was the Pastore bill, named after its author, Senator Pastore of Rhode Island. S.2004, 91st Cong., 1st. Sess. (1969).

The Pastore bill would have amended §309(a) of the Communications Act, 47 U.S.C. §309(a), to provide that the FCC could not consider competing applications for a license at renewal time unless it had first found, based on the licensee's renewal application, "that a grant of the application of a renewal applicant would not be in the public interest, convenience and necessity..."

This was not merely a proposed reversal of the decisional rule of WHDH on the weight to be given to past performance. It went much farther, and would have abolished the comparative hearing altogether unless the licensee was first disqualified on his own record. Absent such a finding a renewal applicant would not have to meet the challenge of even a much superior competing proposal. This was much desired by the industry; it would spare them the expense and the uncertainty of comparative hearings. Comment, supra, 118 U.Pa.L.Rev. at 396-97. In practical effect the bill was a perpetual monopoly charter for the industry.

Senator Pastore held hearings on the bill in August and in December, 1969. Hearings Before the Communications Subcommittee of the Senate Commerce Committee on S.2004, 91st Cong., 1st Sess., August 5,6,7; December 1,2,3,4,5, 1969. The industry's witnesses unanimously supported the bill; a number of "mavericks" and citizens groups, including representatives of these petitioners, opposed it.

The FCC itself opposed the bill. Hearings, supra at 375. From July, when it was first considered, to December, when the majority's opinion was presented to the Subcommittee, a 6-1 FCC majority against the bill had eroded to 4-3 by changes in the FCC's membership. Ibid; id. at 384. But the Commission majority stated:

The Commission strongly believes that the spur to a lagging broadcaster posed by the threat of competitors at renewal time is an important factor in securing operation in the public interest. The Commission's staff is not large, and there are over 7,000 broadcasting stations. The existing procedures at renewal time provide a powerful supplement to our review capabilities in the form of potential competitors who will provide more than a minimal service to the public if the existing licensee is unwilling or unable to do so. Hearings at 376.

New Chairman Burch was one of the dissenters. He did, however, suggest a different formula to meet "the objectives of S. 2004," "as a substitute for the Pastore language as an amendment to the Communications Act":

In any comparative hearing within the same community for the frequency or channel of an applicant for renewal of a broadcast license, the applicant for renewal of license shall be awarded the grant if such applicant shows that its program service during the preceding license term has been substantially, rather than minimally, attuned to meeting the needs and interests of its area, and the operation of the station has not otherwise been characterized by serious deficiencies. Hearings at 394 (emphasis added).

The Commission Reconsiders

Increasing opposition to the bill began to reduce its chances of prompt passage. See Comment, supra, 118 U.Pa.L.Rev. at 393; J.A. 24. Meanwhile, there had been growing pressure in the Commission to adopt some sort of "necessary compromise." See, Policy Statement, dissenting opinion of Comm'r Johnson, J.A. 11. Some form of Commission action had been indicated to the Congress by Commissioner Bartley, the majority spokesman:

We believe that the basic objectives of the bill can be achieved better by administrative decision which will give due weight to good records of operation without removing the incentive for such operation now contained in the act. Such administrative action would, I believe, provide an appropriate resolution of the two main policy issues raised by S.2004. No licensee doing a good job would have to fear loss of his license to a competitor; at the same time, the public's interest in good service should be preserved through retention of the opportunity for replacement of licensees doing a minimal public service by those better equipped for the task. Hearings at 378 (emphasis added).

This sounded like a retreat to the status quo ante WHDE, a retreat that the Commission might have been able to make in a proper proceeding. Instead, as we shall see, the Commission usurped the power of Congress and adopted (by an improper administrative order, see pp. 30-32, infra) the change in hearing practice that Chairman Burch had proposed as an amendment to the Act.

The first announcement of imminent FCC action came, not directly from the Commission, but apparently through a Commission "leak" in a story published in Broadcasting Magazine's December 29, 1969, issue. On page 5, Broadcasting tersely reported:

If Chairman Burch has his way--and odds are with him --FCC's 1970 regulatory year will open with

breakthrough in station licensing policy to alleviate "strike" application chaos triggered by WHDH-TV Boston revocation case just year ago...Chairman Burch suggested policy whereby applicant for renewal would get grant following comparative hearing if he makes adequate showing that his program service was substantially attuned to needs and interests of his area.

Adoption of proposal by FCC would negate WHDH-TV precedent in which no weight was given program performance but was decided entirely upon concentration of media (WHDH's newspaper ownership) and integration of new ownership in management. (Emphasis added.)

The Policy Statement embodying this suggestion was issued on January 15, 1970.

The Policy Statement

The Policy Statement substantially followed Chairman Burch's proposed amendment to the Communications Act, p. 12, supra. The Statement established

the following policy--namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. Policy Statement, J.A.6 (footnote omitted; emphasis added).

In short, the new applicant gets no hearing on his application until after a decision based on the renewal applicant's application alone that its programming service has been "minimal" and not "substantial."

Examiners will be clear as to our general policy. Indeed, it may significantly shorten hearings. If the Examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. Id. J.A. 9.

The rest of the Statement is an attempt to demonstrate that this is not a new procedure. It also indicates that the competing applicant is not to be shut completely out of the first stage of consideration of the renewal application; he, like anyone filing a petition to deny license renewal, "would have the...opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one." Id. J.A. 7. But at this stage of the proceeding, "the matter is not a comparative one but rather whether substantial service has been rendered..." Ibid.

The Policy Statement thus substitutes a hearing on one side's case alone, limited to one issue, for the comparative hearing on all relevant comparative criteria. It is, in the words of the dissenting Commissioner,

comparable to providing that there be no new competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not "substantially" serving the public interest. Id., J.A. 12.

The Policy Statement Applied:
Competition Vanishes

The Policy Statement has had precisely the effect the broadcast industry had hoped the Pastore bill would have. Cf. Comment, supra, 118 U.Pa.L.Rev. at 396-97. It has choked off competing applications for broadcast licenses at renewal time.

Successful challenges for broadcast licenses are rare at best. The average cost of such a challenge has been estimated at \$250,000. Comment, supra, 118 U.Pa.L.Rev. at 397, n.125.

From Hearst Radio, Inc., (WBAL), 15 F.C.C. 1149(1951), to WHDH, Inc., 16 F.C.C. 2d 1(1969), competing applications for only nine existing TV licenses were filed. In all nine allegations or findings that the licensee was guilty of improper conduct had attracted the competing applications.

In five of these instances competitors applied only after the Court of Appeals had ordered the license proceeding opened to competition because of misconduct in the initial award of the license. In two of these cases, the incumbent kept his license. Two others are still undecided. In only one, WHDH itself, was the license awarded to a challenger. Hearings on S.2004, supra, at 385 (Statement of Comm'r Cox). Of the four other applications filed between WBAL and WHDH, the hearing examiner ruled that the challenger should prevail in one, RKO-General, Inc. (KHJ-TV), Docket No. 16679, 16 P. & F. Radio Reg. 2d 1181(1969), app'l pending to Comm'n, and that the incumbent should prevail in another, Moline Television Corporation WQAD-TV, Docket No. 17993, F.C.C. 69D-11 (Feb. 18, 1969), app'l pending to Comm'n; one has been withdrawn, United Television Company, Inc. WFAN-TV, Docket No. 18559, and the fourth, KBLI, Inc. (KTLE-TV), Docket No. 18401, is pending.

WHDH hardly opened the floodgates, even though the decision indicated that the FCC had decided to impose higher standards on incumbents--specifically, to give no preference for "average performance." 16 F.C.C. 2d at 9. In the year from January 22, 1969, when the WHDH decision was announced, to January 15, 1970, when the Policy Statement was issued, nearly 300 TV station licenses came up for renewal. Only eight renewal applications were challenged. Eight challenges out of a potential 300 seem unlikely to have threatened the stability of the industry.

The Policy Statement effectively chilled competition for existing licenses. From January 15, 1970, to November 1, 1970, more than 250 TV licenses have come up for renewal. Not one competing application has been filed.

The fate of the post-WHDH challenges demonstrates the chilling effect of the Policy Statement on competition. Two, WESH-TV, BCPT 4346 (January 2, 1970), in Daytona Beach, Fla., and WFMY-TV, BCPT 4303 (November 3, 1969), in Greensboro, N.C., have not yet been designated for hearing. One, WPIX-TV was designated for hearing before the Policy Statement was issued. WPIX, Inc. (WPIX-TV), Docket No. 18711, 20 F.C.C. 2d 298 (October 28, 1969). In two, WTAR Radio-TV Corporation (WTAR-TV), Docket No. 18791, 21 F.C.C. 2d 234 (January 27, 1970), and Southern Broadcasting Company (WGHP-TV), Docket No. 18906, F.C.C. 70-706 (July 8, 1970), the designation orders stated that the Policy Statement was to be applied. In one, designated for hearing in December 1969, the Policy Statement has since been ruled applicable. RKO General, Inc. (WNAC-TV), Docket No. 18759, 23 F.C.C. 2d 448 (May 25, 1970)* /

But in two of the eight challenges petitions were filed to allow withdrawal of the competing applications in exchange for payment of the competitors' expenses. National Broadcasting Company, Inc. (KNBC-TV), Docket No. 18602, Agreement, approved 24 F.C.C. 2d 218 (July 7, 1970). Post-Newsweek Stations, Florida, Inc. (WPLG-TV), Docket No. 18899, petition for approval pending. In both instances the challengers declared that they had been induced to withdraw because the Policy Statement made further proceedings futile.

* / WPIX and WGHP present anomalous facts that make the Policy Statement's impact minimal. WTAR's new applicant, Hampton Roads, and WNAC's licensee and challengers are all parties here in No. 24,491.

The challengers to KNBC "were forced to reassess their chances of success in the comparative hearing" and concluded "that those chances had been affected so adversely" by the Policy Statement that withdrawal was advisable. KNBC-TV, supra, Joint Petition for Approval of Agreement, 4.

Proceedings Leading to this Appeal

On January 7 the Petitioners filed an action in the District Court to restrain the FCC and its Commissioners from promulgating the "suggested policy" that had been announced in Broadcasting the week before. It was expected that the FCC would act the next day at its weekly meeting. Petitioners sought a temporary restraining order, which was denied that afternoon. J.A. 1. The FCC did not act until the following week, on January 15, but before petitioners' motion for a preliminary injunction could be heard. J.A. 2.

At the hearing the District Court denied the preliminary injunction as moot and, at the suggestion of the counsel for the Commission, dismissed the action for lack of jurisdiction. The Commission had argued that "exclusive judicial review jurisdiction /of the FCC's action/ is vested directly in the Courts of Appeal. 47 U.S.C. 402(a); see also 28 U.S.C. 2342-2344," and that petitioners had "failed to exhaust their administrative remedy." Suggestion of Lack of Jurisdiction, Record in No. 24,221, at 78; J.A. 1. Petitioners' appeal from that dismissal is before this Court in No. 24,221.

Meanwhile, in an effort to exhaust every possibility of administrative relief, the petitioners on January 9 filed with

the FCC a petition for rule making. J.A. 3. The petition urged the FCC to deal with the issue of comparative hearings in a formal rule making proceeding, on the record, after a hearing. The petition urged that the "policy" route the FCC apparently had decided to follow violated the Administrative Procedure Act.

This attempt to forestall FCC action failed. On January 15 the FCC, over the dissent of one member, issued the Policy Statement; on January 16 the FCC, over the dissent of one member, denied the petition for rule making. J.A. 5, 15.

Petitioners again made an effort to persuade the FCC to reverse itself. On February 16 they filed with the FCC petitions for reconsideration and for repeal of the Policy Statement and a petition for reconsideration of the January 16 denial of the petition for rule making. Other parties involved themselves in the controversy. J.A. 3-4. Finally, on July 21, 1970, the FCC denied all the petitions, again with one dissent. J.A. 18.

Petitioners and another petitioner, Hampton Roads Television Corporation, filed petitions for review in this Court pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342. Nos. 24,471; 24,291. All the appeals have been consolidated for briefing and argument.

ARGUMENT

- I. THE POLICY STATEMENT VIOLATES THE COMMUNICATIONS ACT, WHICH REQUIRES A FULL COMPARATIVE HEARING ON ALL ISSUES WHEN TWO APPLICATIONS ARE FILED FOR THE SAME FREQUENCY.

The Statute:

Section 309 of the Communications Act of 1934

The statutory scheme applicable to renewal of broadcast licenses is simple. Section 307(d) of the Communications Act of 1934, 47 U.S.C. §307(d) provides that renewal of a broadcasting license may be granted for a term of no more than three years "if the Commission finds that public interest, convenience and necessity would be served thereby." Section 308 provides for the filing of written applications for renewal or for initial grant of a license. Section 309(a) provides that upon the filing of such an application "the Commission shall determine....whether the public interest, convenience, and necessity will be served by the granting of such application" and if the Commission does so find, it "shall grant such application." (Emphasis added.)

Section 309(e) provides that if in the case of any application

a substantial and material fact is presented or the Commission for any reason is unable to make the finding specified in such subsection [309(a): that "the public interest convenience and necessity would be served" by grant of the application] it shall formally designate the application for hearing....Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. (Emphasis added.)

Section 309 is the foundation for the comparative hearing. Where two applications--here a renewal application and a new application--are made for the same broadcast frequency, the Commission cannot find that "the public interest, convenience, and necessity would be served" by grant of both. Two stations on the same frequency "would result in mutually destructive

interference," e.g., RKO General, Inc. (KHJ-TV), Docket No. 16679, F.C.C. 66-503 (released June 8, 1966). Since grant of one application would necessarily mean denial of the other, a full comparative hearing is mandated by statute.

Before Ashbacker: Hearings Refused

The FCC and its predecessor nevertheless took the view in the 1930s that the grant of a hearing on mutually exclusive applications was not required but was only discretionary. It had persisted in this view despite consistent Court of Appeals reversals. See, e.g., Symons Broadcasting Co. v. F.R.C., 62 App. D.C. 46, 64 F. 2d 381 (1933); Westinghouse Electric and Manufacturing Co. v. F.R.C., 60 App. D.C. 53, 47 F.2d 415 (1931); Courier-Journal Co., et al. v. F.R.C. 60 App. D.C. 33, 46 F.2d 614 (1931); Saltzman v. Stromberg-Carlson Telephone Manufacturing Co., 60 App. D.C. 31, 46 F.2d 612 (1931).

Commission procedural rules in the 1930s reflected its view that hearings were discretionary. See General Order No. 93, Federal Radio Commission Fourth Annual Report to Congress, 27 (1930); F.R.C., Rules and Regulations of the Commission, Part II, Practice and Procedure, §4 (1934); F.C.C. Rules and Regulations, Part I, Practice and Procedure, Rule 106.4 (January 1, 1939).

In 1940 the Supreme Court held that the FCC could require a comparative hearing, reversing the contrary holding of the Court of Appeals. F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). The Commission took this to be approval of its position that hearings were discretionary, not required, and proceeded to approve a number of applications without hearing in cases where competing applications had been

filed. Evangelical Lutheran Synod of Missouri, 8 F.C.C. 118 (1940); New Jersey Broadcasting Corp., 8 F.C.C. 154 (1940); Illinois Broadcasting Corp., 8 F.C.C. 183 (1940); The Evening News Association (WWJ), 8 F.C.C. 522 (1941); Meried Broadcasting Co., 9 F.C.C. 118 (1942).

The Ashbacker Doctrine

In Ashbacker Radio Corp. v. F.C.C. 326 U.S. 327 (1945), the Supreme Court instructed the FCC that it had misread Pottsville. In Ashbacker, the FCC, without hearing, granted one application for a license to broadcast on a frequency in a locality, while there was pending another application to broadcast on the same frequency in the same locality. The FCC had found the applications "mutually exclusive." 326 U.S. at 328.

The Supreme Court reversed. It held:

Our chief problem is to reconcile two provisions of §309(a) where the Commission has before it mutually exclusive applications. The first authorizes the Commission "upon examination" of an application for a station license to grant it if the Commission determines that "public interest, convenience, or necessity would be served" by the grant. The second provision of §309(a) [now in substance in §309(e)] says that if, upon examination of such an application, the Commission does not reach such a decision, "it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." It is thus plain that §309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. We do not think it is enough to say that the power of the Commission to issue a license on the finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Cong-

ress has accorded applicants before denials of their applications becomes an empty thing. We think think that is the case here. 326 U.S. 329-30 (emphasis added; footnote omitted).

* * *

The public, not some private interest, convenience, or necessity governs the issuance of licenses under the Act. But we are not concerned here with the merits. This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses. Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him. Id. at 333 (emphasis added; footnotes omitted).

The FCC Complies: From Ashbacker to the Policy Statement

The courts defined for the Commission precisely how a comparative hearing was intended to be conducted:

A choice between two applicants involves more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified but if a choice must be made, the question is which is better qualified. Comparative qualities and not mere positive characteristics must then be considered ...The Commission...must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases. Johnston Broadcasting Co. v. FCC, 85 App. D.C. 40, 175 F.2d 351, 356-7 (1949).

The statutory hearing requirement that the Supreme Court recognized in Ashbacker was followed faithfully by the FCC*/ until

*/On remand in Ashbacker itself the Commission held a full comparative hearing on the relative merits of each applicant for the frequency. John E. Fetzer, 11 F.C.C. 515 (1946).

1970.^y Without exception, in all cases where a renewal application was challenged by a competing application for the same frequency, a comparative hearing was ordered. A typical example follows:

1. The Commission has before it for consideration the above-captioned applications, one requesting a renewal of its license to operate on Channel 9, Los Angeles, California, and the other requesting a construction permit for a new television broadcast station to operate on Channel 9, Norwalk, California, a community located within 15 miles of Los Angeles. Since the operation proposed by both of the applicants would result in mutually destructive interference, they are mutually exclusive and a hearing will be required to determine which application should be granted. RKO General, Inc. (KHJ-TV), Docket No. 16679, F.C.C. 66-503 (released June 8, 1966).

On the eve of the adoption of the 1970 Policy Statement, the FCC still followed the Ashbacker interpretation of the hearing requirement. In its designation order in RKO-General, Inc. (WNAC-TV), Docket No. 18759, 20 F.C.C. 2d 846 (December 11, 1969), the Commission said:

8. Except as indicated by the issues set forth below, RKO-General, Inc., is qualified to own and operate television station WNAC-TV and except as indicated by the issues set forth below, Community Broadcasting of Boston, Inc., and The Dudley Station Corporation are qualified to construct, own and operate the proposed new television

*/South Florida Television Corp. v. FCC, 121 U.S. App. D.C. 293, 349 F.2d 971 (1965), cert. den. 382 U.S. 987 (1966); Massachusetts Bay Telecasters v. FCC, 104 U.S. App. D.C. 226, 261 F.2d 55 (1958); McClatchy Broadcasting Co. v. FCC, 99 U.S. App. D.C. 199, 239 F.2d 15 (1956), cert. den. 353 U.S. 918, reh. den., 353 U.S. 952 (1957); Scripps-Howard Radio v. FCC, 89 U.S. App. D.C. 13, 189 F.2d 677, cert. den., 342 U.S. 830 (1951); Plains Radio Broadcasting Co. v. FCC, 85 U.S. App. D.C. 48, 175 F.2d 359 (1949); Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); Chapman Radio and Television Co., Inc. 7 FCC.2d 213 (1967); Seven (7) Leagues Production, Inc. et al. 1 FCC.2d 1597 (1965); St. Louis Telecast Co., Inc. 22 FCC.625 (1957).

broadcast station. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore, unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below. Since this is a renewal-new applicant proceeding, RKO's past broadcast record during the previous license term, favorable and unfavorable, will be relevant, Hearst Radio, Inc., 15 FCC. 1149, 6 R.R. 994 (1951).

The order went on to designate as other specific issues for the comparative hearing the financial qualifications of both competing applicants and alleged anticompetitive practices of the licensee--as well as "which of the proposals would best serve the public interest." Ibid.

In December, 1969, it was still the rule that a new applicant was to be heard on his own application.

The 1970 Policy Statement: Ashbacker Abandoned

With the promulgation of the Policy Statement in January of this year, the FCC abandoned the full comparative hearing that, it had been supposed, Ashbacker had settled was required by the Act. It substituted a new procedure: first, a hearing on the renewal application alone, on only one issue: programming service. Then, only if the renewal applicant's programming failed to pass muster, a second stage of the hearing would consider all the competing applications on the comparative criteria. Pp. 14-15, supra.

WNAC-TV illustrates what this means. Shortly after the Policy Statement was issued, Dudley, one of the two competing applicants, filed a petition for clarification of the effect of the Policy Statement on the hearing. Dudley asserted

that there was "confusion concerning the effect of the 1970 Policy Statement upon evidentiary showings as to programming." The Review Board of the FCC ruled on the petition on May 25, 1970.

It stated that there should be no such "confusion":

The 1970 Statement clearly and unequivocally establishes that, in the initial state of a proceeding governed thereby, the only relevant evidence is that concerning the past performance of the renewal applicant, and the program policies of the challenger are neither relevant nor admissible:

"The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainties of community needs and problems) is...not a comparative [matter] but rather [a matter] whether substantial service has been rendered..." (18 R.R. 2d at 1906).

In our view, a comparison of program policies of the renewal applicant and challenger will not be made unless and until the second phase of the proceeding is reached. Thus, an evidentiary showing by the challenger regarding its program policies should not be accepted in the initial stage of the hearing. RKO-General, Inc. (WNAC-TV), Docket No. 18759 (May 25, 1970) (footnote omitted).*/

In January, 1970, a new applicant can be shut out without being heard on his own application.

*/The three contenders in WNAC-TV are before this Court in No. 24,491.

II. THE COMMISSION'S ACTION EXCEEDS ITS STATUTORY POWERS AND IS IN VIOLATION OF LAW

The Limits of Rulemaking Power

By issuing the 1970 Policy Statement the FCC was engaging in the familiar agency practice of rulemaking. "General Statements of policy" are rules as defined in the Administrative Procedure Act, 5 U.S.C. §553 (b) (3) (A) and in the Commission's rules, F.C.C. Rules & Regulations §1.412(b) (4), 47 C.F.R. §1.412.

General Statements of policy, like other rules and regulations, "must be consistent with law." International Ry. Co. v. Davidson, 257 U.S. 506, 514 (1922). Regulations may not "modify /a statute's/ provisions". Campbell v. Galeno Chemical Co., 281 U.S. 599, 610 (1930).

The rulemaking power is no more than

the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Manhattan General Equipment Co., v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936).

The principle has been adopted by this Court. Hamilton Nat'l Bank v. District of Columbia, 81 U.S. App. D.C. 200, 156 F.2d 843, 846 (1946), (Prettyman, J.), cert. denied, 338 U.S. 891 (1946).

The Policy Statement is inconsistent with law. It would impose a requirement not included in the statute and apparently recently rejected by the Congress (see pp. 10-14 supra) on a competing applicant's statutory right to a comparative hearing on his own application. (See pp. 11, 14-15, supra.) Such a modification of a critical right is in effect an

amendment of the statute. But only Congress, not the Commission, has power to do this.

The statute provides that the FCC "shall determine... whether the public interest, convenience and necessity will be served by the granting of such application," 47 U.S.C. §309(a) (emphasis added). "Such application" includes applications competing with renewal applications. 47 U.S.C. §§307(d), 308. When it cannot make the §309(a) finding the FCC "shall" designate the application for hearing. 47 U.S.C. §309(e). The hearing "shall be a full hearing," 47 U.S.C. §309(e) (emphasis added). "The Statute, of course, requires" a full hearing. Cf. Retail Store Employees Union Local 880 v. F.C.C. ___ U.S. App. D. C., ___ F.2d ___ (No. 22,605, decided October 27, 1970) slip opinion at 14, n.47. In Ashbacker and Johnston Broadcasting v. F.C.C., supra p.23, the Courts spelled out what such a "full hearing" required.

In imposing a new obstacle to the "full hearing" the FCC is in violation of the statute. "The word 'shall' is ordinarily the language of command." Anderson v. Yungkau, 329 U.S. 482, 485 (1947). Where

the provisions of the Act are unambiguous, and its directions specific, there is no power to amend it by regulation. Koshland v. Helvering, 298 U.S. 441, 447 (1936).

Miller v. United States, 294 U.S. 435 (1935), is instructive. The agency had by regulation made certain losses automatically a "total permanent disability", even though the statute created an issue of fact as to "total permanent disability". The agency thus shifted--or eliminated--a burden of proof,

creating a conclusive presumption. The Supreme Court held the regulation invalid:

The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act--not to amend it. 294 U.S. at 440.

The Policy Statement too creates "a conclusive presumption which dispenses with proof and precludes" a comparative hearing. This too "is beyond administrative power."

The Commission's Transparent Disguise of Its Action - I

The Commission has attempted to disguise what the Policy Statement does by asserting:

This is not new policy. It was largely formulated in the leading decision in this field, Hearst Radio Inc. (WBAL), 15 F.C.C. 1149 (1951), where the Commission, in favoring the existing licensee, stated that where a choice must be made between an existing licensee and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of ownership and management. Policy Statement, J.A. 6.

See also the Commission's denial of the petition for reconsideration, par. 3, J.A. 18.

The Commission ignores the major distinction between the Policy Statement and the decisional rules developed in WBAL, WHDH and the intervening cases. In those cases, the matters decided were the relative weight to assign to various factors and the standards for measuring the licensee's performance against the challenger's proposal--but within the full comparative hearing. In the procedure inaugurated in the

Policy Statement, however, the challenger may be denied a comparative hearing on his own application altogether.

The difference is crucial. Under the WBAL-WHDE rule, even though the incumbent's programming served "substantially the major needs of its service area" the challenger was entitled to try to show that his superiority on other comparative criteria was strong enough to overcome the preference awarded to the incumbent for programming. Under the Policy Statement the programming preference is conclusive and forecloses the challenger's opportunity to present his own case. Cf. Miller v. United States, 294 U.S. 435 (1935), supra, pp. 28-29.

The Commission also asserts that "parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation." J.A. 16, 19. This is a hollow concession. As the Commission admits, a party is always free to argue for waiver of a rule. J.A. 19, n.1. The opportunity to argue that an unlawful rule should not be applied does not cure the illegality. The chilling effect of the rule remains, frustrating the Congressional purpose to foster competition.

The Commission's Transparent Disguise of its Action - II

A final infirmity in the Policy Statement is that it was issued without the Commission following the notice requirements of the Administrative Procedure Act, 5 U.S.C. §553(b), and the Commission rules, F.C.C. Rules & Regulations §1.412, 47 C.F.R. §1.41

Of course, "general statements of policy" are exempt

from the notice requirements. But the Commission's characterization of its action as a "Statement of Policy" is not dispositive of the matter.

The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942).

The term is explained in the Final Report of the Attorney General's Committee on Administrative Procedures, Senate Document No. 8, 77th Cong., 1st Sess. (1941). It refers to

approaches to particular types of problems, which as they become established, are generally determinative of decisions...As soon as the 'policies' of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that may advantageously be brought to public attention by publication in a precise and regularized form. Id. at 26-27 (footnote omitted)

Here the Commission asserts that the 1970 Policy Statement merely crystallizes the decisional rules developed in WBAL and later cases.*/ We have shown that claim to be a sham and that the Policy Statement would abrogate a fundamental right -- the right to a full comparative hearing.

We do not, however, seek reversal of the Policy Statement on the ground only that the change should have been made via

*/ That view was apparently the Commission's alone. Two distinguished members of the communications bar have sworn that the Policy Statement

confirmed their prior view that the Commission's actions in December 1969 /the Bartley statement before the Pastore hearings, p.13 supra and the designation order in WNAC, p.24 supra/ had evidenced a basic change from what...the broadcast industry generally had considered to have been the bases upon which a new applicant would be compared to a regular renewal. (sic)

Affidavit of Bernard Koteen and Edward P. Morgan, filed in support of Joint Petition for Approval of Agreement (to drop competing application), National Broadcasting Company, Inc., (KNBC), Docket No. 18602, filed February 13, 1970; p. 17, supra (emphasis added).

a notice-and-comment rule making. We submit that the vice of the Policy Statement is a fundamental violation of the Communications Act. Nor do we relish the spectacle of the Commission going through a pro forma rule making only to produce an identical result. Cf. Office of Communication of United Church of Christ v. F.C.C. ____ U.S. App. D.C. ___, ____ F. 2d ____ (No. 19,409, decided June 20, 1969), slip opinion at 12-13 (Burger, J.). We submit that here too "the administrative conduct reflected in this record is beyond repair." Ibid.

III. THE POLICY STATEMENT WILL HAVE EFFECTS VIOLATIVE
OF CONSTITUTIONAL RIGHTS

The Policy Statement Restricts and Chills the Exercise
of Rights Protected by the First Amendment

1. To say that the exercise of the First Amendment-protected guarantee of free speech requires a platform is a commonplace. The right to speak would be a sham if the right to reach an audience were not its necessary corollary. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963); Saia v. New York, 334 U.S. 558 (1948); Davis v. Francois, 395 F. 2d 730 (5th Cir. 1968); Wolin v. Port of New York Authority, 392 F. 2d 83 (2d Cir. 1968); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

Anyone may publish a newspaper or distribute a handbill. The only limitation is the size of one's purse. Anyone may speak or demonstrate in a public place, but only one person may speak from one podium at one time. Two persons seeking to speak from the same podium at the same time would drown each other out. Neither would be heard. Either one must speak elsewhere or they must speak consecutively. Yet each has a right to speak that the First Amendment protects. Access to broadcast media is this latter situation multiplied by millions.

In short, in 1970, "effective public speech," Saia v. New York, supra, 334 U.S. at 561-62, requires access to the broadcast mass media of communications. See Barron, An Emerging First Amendment Right to Access to the Media, 37 Geo. Wash. L. Rev. 427 (1969); Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1941 (1967).

Broadcast frequencies are limited in number. Two seek-

ing to broadcast on one frequency, in the F.C.C.'s familiar formula, "would result in mutually destructive interference."

WNAC-TV, supra, Docket No. 18759, Order of December 11, 1969.

To pursue the analogy, they must either broadcast at different times or they must broadcast on non-interfering frequencies.

But each has a First Amendment-guaranteed right to access to the medium.

2. Under the present scheme of regulation, access can only be obtained by control of a license. This is because of the nearly unfettered discretion the licensee now has over what is broadcast and by whom. Committee for Fair Broadcasting, et al., 25 F.C.C. 2d 283 (1970), aff'd F.C.C. 70-999, 25 F.C.C. 2d _____, (September 24, 1970), app'l pending, No. 24,655 (D.C. Cir.); Business Executives' Move For a Vietnam Peace, 25 F.C.C. 2d 242 (1970), app'l pending No. 24,492 (D.C. Cir.); Democratic National Committee, 25 F.C.C. 2d 216 (1970), app'l pending, No. 24,537 (D.C. Cir.); Friends of the Earth, 24 F.C.C. 2d 743, 750-51 (1970), app'l pending, No. 24,556 (D.C. Cir.); San Francisco Women for Peace, 24 F.C.C. 2d 156 (1970), app'l pending, No. 24516 (D.C. Cir.); Response to Inquiry by Honorable Richard L. Ottinger re ABC Censorship of Judy Collins, F.C.C. mimeo #47879 (April 20, 1970); Madlyn Murray, 40 F.C.C. 647 (1965); Applicability of the Fairness Doctrine In the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964). See Back Alley Theatre, Inc., F.C.C. 70-594, 25 F.C.C. 2d _____ (September 4, 1970); Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 F.C.C. 2d 880 (1969); Ascertainment of Community Needs by Broadcast Applicants, F.C.C. 68-847, 33 Fed. Reg. 12113 (1968).

3. The First Amendment therefore requires the maximum opportunity for a new group to obtain a broadcast license. This requirement is satisfied as long as there remain non-interfering frequencies reaching the same audience and there is free opportunity for all to apply for a license to use the frequency. But in many localities the spectrum is full. Therefore, in order to satisfy the First Amendment there must be an opportunity for all to compete at renewal time for existing frequencies. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. at 398:

"Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has become necessary to suspend new applications. The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although spaces reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled." (footnotes omitted).

Indeed this is the preferred alternative:

Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Id., 395 U.S. at 400.

The opportunity thus to compete for licenses at renewal time may constitutionally be subject to no more than the minimum limitations necessary to serve other compelling interests. Cf. United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). See generally, Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969): Wormuth & Merkin, The Doctrine of the Reasonable Alternative,

9 Utah L. Rev. 254, 267-93 (1964). The Policy Statement violates this principle. It reduces the opportunity to compete at renewal time for an existing frequency by imposing an obstacle that potential applicants will find insuperable, as did the challengers in KNBC-TV and WPLG-TV, supra. Yet there has been no showing that the comparative hearing, as it was conducted from Ashbacker to 1970, failed to protect the stability of the broadcast industry.

Congress in §§307, 308 and 309 of the Communications Act struck a balance between the interests of stability and the security of investment on the one hand and competition and the opportunity to challenge for a license at renewal time on the other hand. We do not challenge the balance Congress struck, at least as it was implemented by the F.C.C. during 1969 in the light of WHDH. Congress did not choose to alter that balance.

The Policy Statement did alter that balance heavily in favor of incumbents and against competing applicants. It thereby restricted the First Amendment rights of those who choose at renewal time to apply for a license held by another.

Moreover, it has and will deter potential competitors from filing at all. See pp. 15-18, supra. It thus has a constitutionally prohibited chilling effect on the exercise of a First Amendment right. Baggit v. Bullet, 377 U.S. 360, 371-74 (1964); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-63 (1958); American Communications Ass'n v. Dowds, 339 U.S. 382, 393 (1950).

To sum up we refer again to the words of the Supreme Court in Red Lion:

It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C.
395 U.S. at 390.

And

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.
395 U.S. at 390.

The Policy Statement Deprives Newly Emerging Minority Groups of Equal Protection of the Laws

Of the 7500 broadcast licenses issued, black groups own no more than a dozen. Were all 8500 to be awarded anew tomorrow, such a result would be compelling evidence of discrimination in violation of the equal protection guarantees of the Fourteenth Amendment. The choking off of comparative hearings makes it more difficult, if not impossible, for emerging minority groups to obtain increased representation in media ownership. The Policy Statement in effect, if not in intent, will result in a denial of equal protection. Cf. Harper v. Virginia Board of Elections, 388 U.S. 663 (1966).

Licensees have nearly complete discretion over programming. Report and Statement of Policy: Re Programming Inquiry, 20 P. & F. Radio Reg. 1902, 25 F. R. 729 (1960); Back Alley Theatre, Inc. F.C.C. 70-594, 25 F.C.C. 2d ____ (September 4, 1970). Minority groups thus have little opportunity to have programming on white-owned local stations that serves their needs and interests--much less programming that represents their point of view.

As long as the FCC refuses to require a fairer programming format the only way minority groups can gain a media voice is through the opportunity to compete for a license at renewal time. There are, as we have noted, "few broadcast forums available to black citizens..." WBAI Complaints, 17 F.C.C. 2d 204 (1969), Concurring Opinion of Commissioner Johnson, at 216. Baker & Ball Violence and the Media (A Task Force Report to the Nat'l Comm'n on the Causes and Prevention of Violence) at 43-65 (1970) document a pattern of nearly complete discrimination against black and Spanish-speaking minority groups in broadcasting -- in employment and in access and in coverage -- most of it, particularly in the South, deliberate. Nor will the Fairness Doctrine solve the problem. It is:

...more subtle and intractable than merely structuring the law so that if a Negro group seeks a reply to an anti-Negro or anti-civil rights editorial or wishes space for a political advertisement, the mass media will have an obligation to take it...Until recently, the Negro simply did not exist in the world of television advertising, and he is only barely present now. Barron, An Emerging First Amendment Right of Access in the Media?, 37 George Washington L. Rev. 487, 500 (1969).

Black groups or groups with Black members are currently challenging the renewal of the licenses of WPIX-TV, WNAC-TV and WGFP-TV, all supra, p. 17. The Policy Statement threatens to stifle this effort. The group compelled by the Policy Statement to withdraw its challenge to KNBC-TV, pp. 17-18, supra, was partly black. The discriminatory effect of the Policy Statement can be eliminated only by a reversal by this Court. As the Commission on Civil Rights concluded in its review of the F.C.C.'s role in Civil Rights enforcement:

As the economic and educational levels of minority groups increase, they will have further possibilities and opportunities to compete for radio and television licenses. Unless the FCC modifies its procedures to facilitate minority group participation in ownership of radio and television stations, however, such opportunities will be largely foreclosed. United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort 860 (1970).

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court grant the following relief, pursuant to 47 U.S.C. § 402(h):

(a) Reverse the Commission's order of July 21, 1970 denying petitioners' petition for reconsideration of the Policy Statement;

(b) Reverse the Commission's order of July 21, 1970 denying petitioners' petition for repeal of the Policy Statement;

(c) Declare the Policy Statement to be contrary to law;

(d) Remand these proceedings to the Commission with directions to redesignate all comparative renewal hearings to which the Policy Statement was deemed applicable to reflect this Court's judgment in (a)-(c) above; and

(e) Order the Commission not to apply the Policy Statement in any pending or future comparative renewal hearing.

Respectfully submitted,

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ADDENDUM

I

ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b)⁴⁸ In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.⁴⁹ Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than

⁴⁸ Sec. 307(b) was amended to read as above, by "An Act relating to the allocation of radio facilities," Public No. 652, 74th Congress, approved and effective June 3, 1936; 49 Stat. 1475. The section formerly read as follows:

(b) It is hereby declared that the people of all the zones established by this title are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the Commission shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency, of periods of time for operation, and of station power, to each of said zones when and insofar as there are applications therefor; and shall make a fair and equitable allocation of licenses, frequencies, time for operation, and station power to each of the State and the District of Columbia, within each zone, according to population. The Commission shall carry into effect the equality of broadcasting service heretofore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: Provided, That if and when there is a lack of applications from any zone for the proportionate share of licenses, frequencies, time of operation, or station power to which such zone is entitled, the Commission may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State or District wherein the studio of the station is located and not where the transmitter is located: Provided further, That the Commission may also grant applications for additional licenses for stations not exceeding one hundred watts of power if the Commission finds that such stations will serve the public convenience, interest, or necessity, and that their operation will not interfere with the fair and efficient radio service of stations licensed under the provisions of this section.

⁴⁹ The last sentence of Section 307(d) was added by Public Law 86-752, approved September 13, 1960, 74 Stat. 889.

that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.⁶⁰

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.^{61a}

APPLICATIONS FOR LICENSES; CONDITIONS IN LICENSE FOR FOREIGN COMMUNICATION

SEC. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.⁶²

(b) All applications for station licenses, or modifications or renewals thereof,⁶³ shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.⁶⁴

⁶⁰ Before it was amended by the Communications Act Amendments, 1952, the original § 307(d) read as follows:

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

^{61a} Subsection (e) was amended to read as above by Public Law 87-438, approved April 27, 1962, 78 Stat. 58. It formerly read as follows:

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

⁶² The part of subsection (a) which precedes the second proviso was amended to read as above by the Communications Act Amendments, 1952. This part formerly read as follows:

Sec. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however*, That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months.

⁶³ Subsection (b) was amended to read as above by the Communications Act Amendments, 1952. The first sentence of this subsection formerly read, as follows:

(b) All such applications shall set forth . . .

⁶⁴ Subsection (b) was amended by Public Law 87-444, approved April 27, 1962, 78 Stat. 62, by deleting the words under oath or affirmation from the last sentence.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.⁴⁴

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station.

⁴⁴ So in the original; should read May 27 (see 42 Stat. 8).

IV

(F) authorizations pursuant to section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or ^{34a}

(H) an authorization under any of the proviso clauses of section 308(a).

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has

^{34a} Paragraph (2)(G) of subsection 309(e) was amended to read as above by Public Law 88-307, approved May 14, 1964, 78 Stat. 194. Paragraph (2)(G) was originally added by Public Law 86-752, approved September 13, 1960, 74 Stat. 889, and read as follows:
(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.^{24b} Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued

^{24b} The second sentence of section 309(e) was amended by Public Law 88-306, approved May 14, 1964, 78 Stat. 193, to require a party in interest who wishes to intervene in a hearing to signify his intention to do so not more than thirty days after publication of the hearing issues, or any substantial amendment thereto, in the Federal Register. This sentence formerly read as follows:

When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing.

VI

under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.²⁵

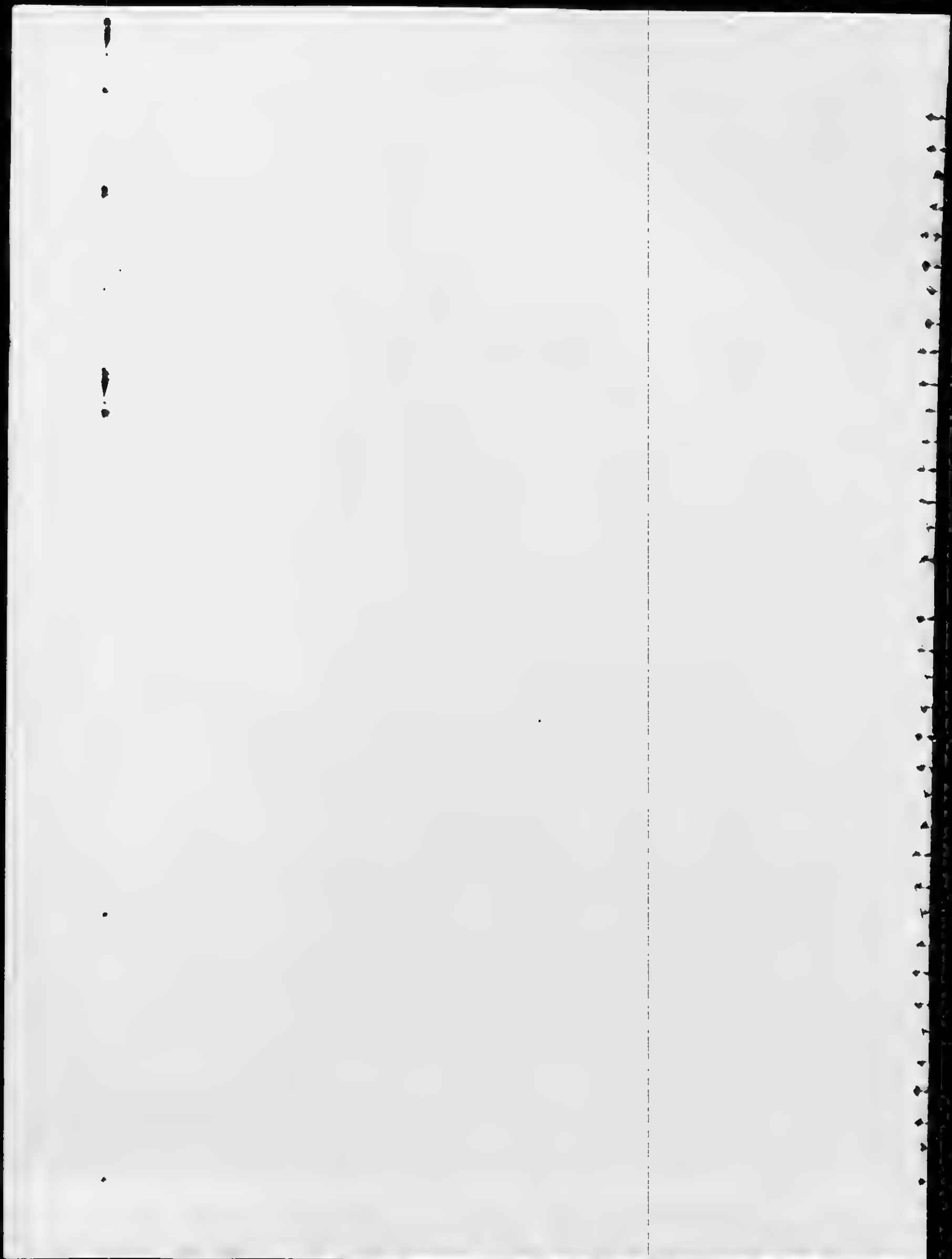
²⁵ Section 309 was amended to read as above by Public Law 86-752, approved September 12, 1960, 74 Stat. 889. It formerly read as follows:

ACTION UPON APPLICATIONS: FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the



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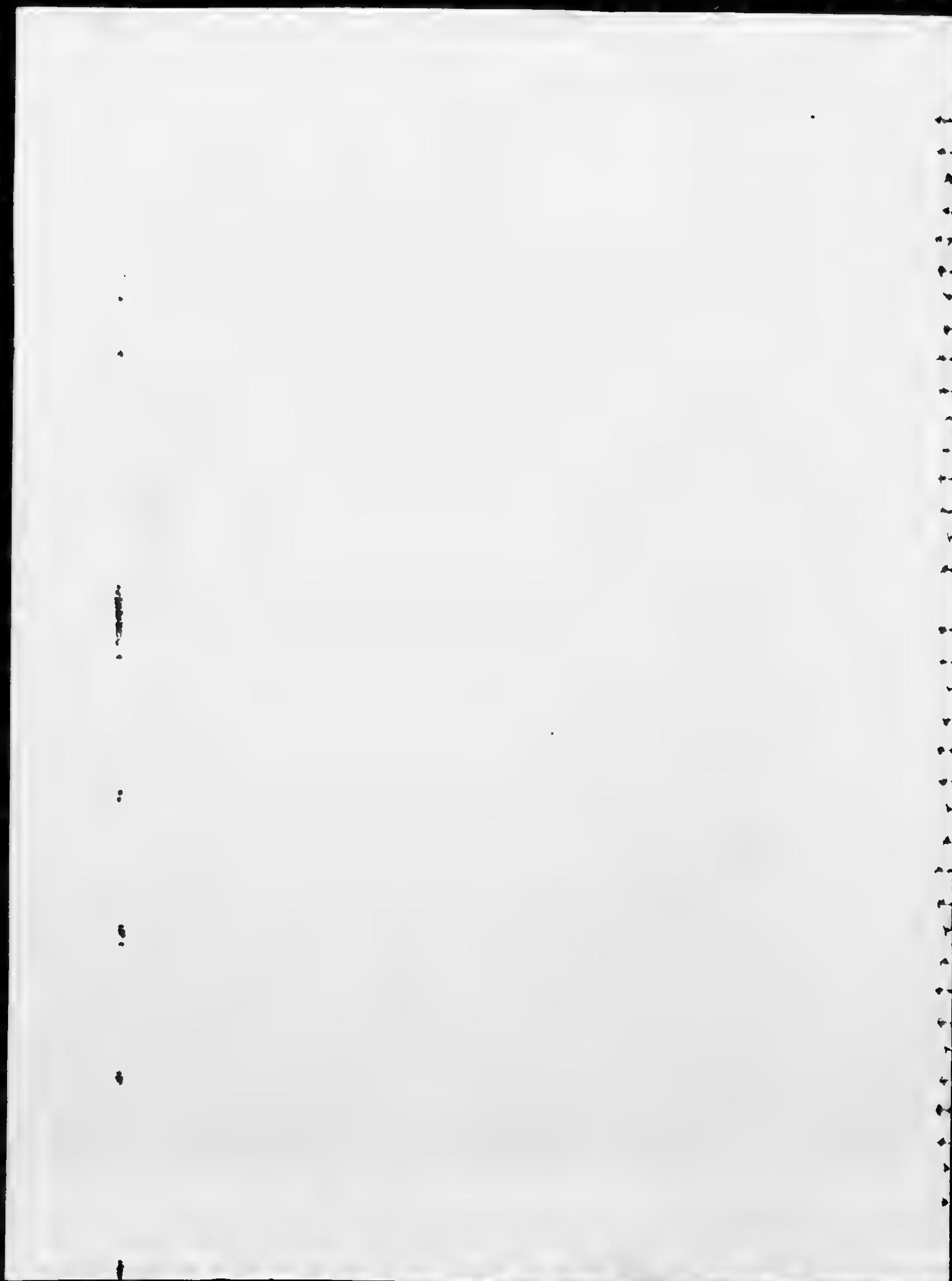
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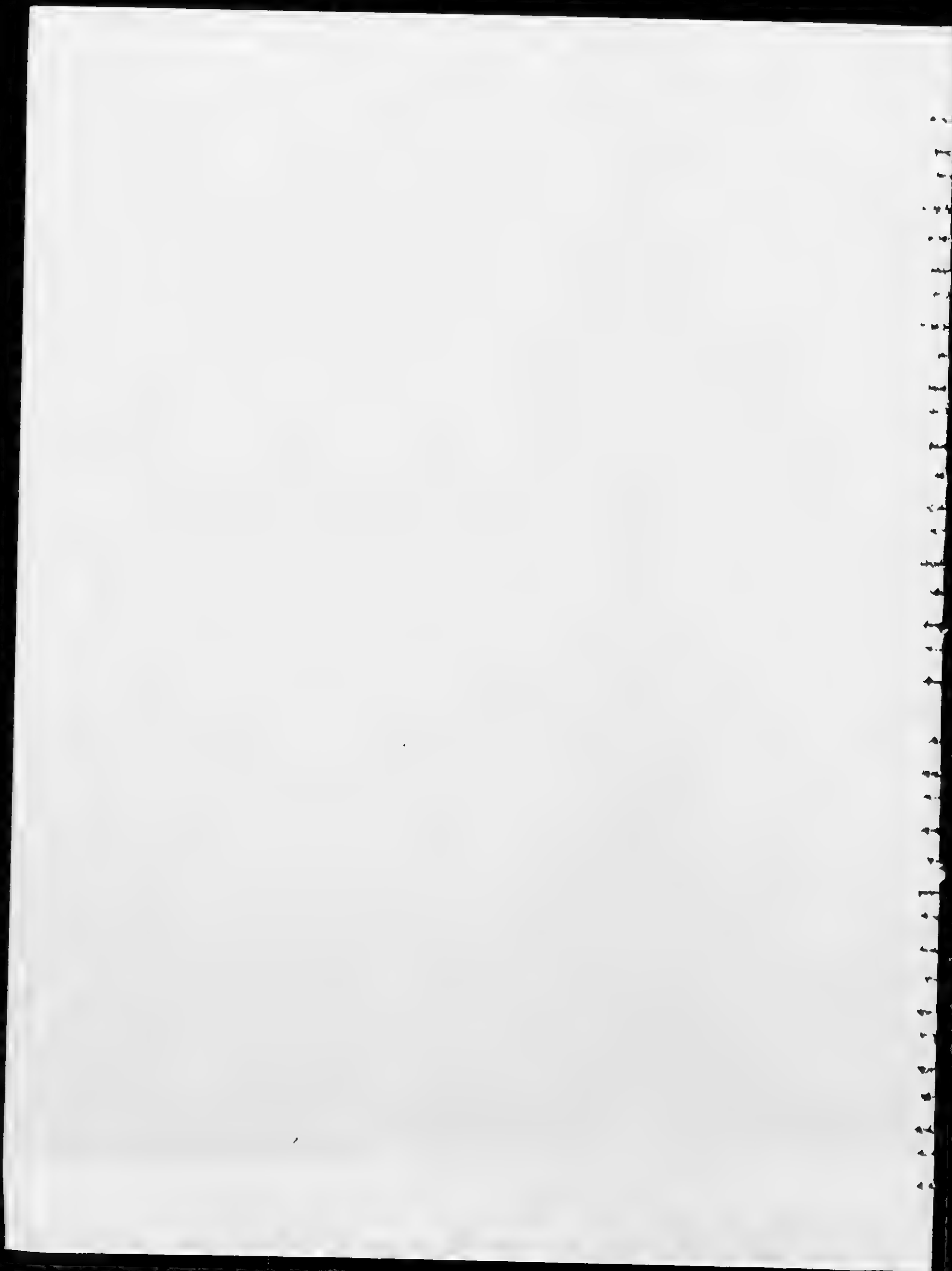
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BRIEF FOR PETITIONERS
HAMPTON ROADS TELEVISION CORPORATION AND
COMMUNITY BROADCASTING OF BOSTON, INC.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is it lawful under Section 309(e) of the Communications Act of 1934 and the doctrine of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), for the FCC to

grant an application for renewal of a broadcast license without affording a mutually-exclusive applicant a comparative hearing on the merits of his application?

2. Can the Commission lawfully adopt a policy or rule that in a comparative hearing between a license renewal applicant and a mutually-exclusive new applicant, the renewal applicant shall obtain a *controlling* preference for a showing of substantial past performance without serious deficiencies?

3. In view of the First Amendment requirement of diversification of the media, can the Commission grant a license to a renewal applicant without taking into consideration in a comparative hearing between such applicant and a mutually-exclusive new applicant, the question whether a grant of the competing application would not better serve to diversify the ownership of the mass media?

4. Can the Commission make the substantive changes in the law implicit in the foregoing questions by the issuance of a "policy statement," without following the rule-making procedures required by the Administrative Procedures Act?

This case was previously before this Court, in part, under No. 24,199, entitled *Hampton Roads Television Corporation v. Federal Communications Commission*, a petition for review of the Commission's order designating the application of Hampton Roads for hearing under the Policy Statement at issue herein. The petition for review was dismissed by an Order of this Court on June 25, 1970.

JURISDICTIONAL STATEMENT

This petition for review of the Federal Communications Commission's Memorandum Opinion and Order released July 21, 1970, 24 F.C.C.2d 383, 19 Pike and Fischer Radio Regulation (R.R.) 2d 1902 (1970)¹ denying reconsideration of the Commission's Policy Statement On Comparative Hearings Involving Regular Renewal Applicants released January 15, 1970, 22 F.C.C.2d 424, 18 R.R.2d 1901, is filed by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc. pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2342, 2344; Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702; and Rule 15, Federal Rules of Appellate Procedure, 28 U.S.C.A.

STATEMENT OF THE CASE

On February 28, 1969, Community Broadcasting of Boston, Inc. (Community), composed of a number of leading citizens in the Boston area, filed an application with the Federal Communications Commission for a new television station on Channel 7 in Boston, in competition with the application of RKO General, Inc. for renewal of its license for television station WNAC-TV. RKO General, Inc., a wholly-owned subsidiary of General Tire and Rubber Company, is also the licensee of WRKO (AM) and WROR (FM) in Boston and fourteen other broadcasting stations in the United States, including AM, FM, and TV combinations in New York, Los Angeles, and Memphis and stations in San Francisco, Washington, and Hartford, Connecticut.

¹Since all of the documents on which the petitions for review in these consolidated cases are based have been officially reported, the parties have agreed to rely upon the reported decisions and dispense with a printed appendix.

On August 28, 1969, Hampton Roads Television Corporation (Hampton Roads), composed of leading citizens of Norfolk, Virginia, filed an application with the FCC for a new television station on Channel 3 in Norfolk, in competition with the application of WTAR Radio-TV Corporation for renewal of its license for station WTAR-TV. WTAR Radio-TV Corporation is a wholly-owned subsidiary of Landmark Communications, Inc., publisher of the only two daily newspapers in Norfolk, the *Virginian-Pilot* and the *Ledger-Star*. In addition to WTAR-TV, the subsidiary is also the licensee of stations WTAR (AM) and WTAR-FM in Norfolk. Through other wholly-owned subsidiaries, Landmark Communications, Inc. also owns the only daily newspapers in Roanoke, Virginia and the only daily newspapers and a television station in Greensboro, North Carolina. The president and two other stockholders of Landmark Communications, Inc. also have an interest in the company which owns the only daily newspapers in Richmond, Virginia, and AM and FM radio stations in Richmond.

The applications of Community and Hampton Roads were filed with knowledge of and in reliance upon the Communications Act of 1934 and the rules and policies of the FCC, under which an applicant in competition with a license renewal applicant has always been entitled to a full comparative hearing on his proposal on all relevant factors, including the factor of diversification of the ownership of mass media. On December 11, 1969, the application of Community was designated by the Commission for such a comparative hearing with the application of RKO General, Inc. and a third application which had been filed for the same facility, that of the Dudley Station Corporation.

On January 15, 1970, the Commission released its Policy Statement On Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), which by its terms was made appli-

cable to pending proceedings such as Community's hearing. 22 F.C.C.2d at 430. On January 27, 1970, the Commission released its order designating the applications of Hampton Roads and WTAR Radio TV Corporation for a consolidated hearing in accordance with the Policy Statement. On February 16, 1970, Hampton Roads and Community filed a joint petition for reconsideration of the Policy Statement, and on February 26, 1970, Hampton Roads filed a petition for reconsideration of the designation order in its case, which latter petition was dismissed by the Commission on April 7, 1970. On April 30, 1970, Hampton Roads petitioned this Court for review of the order denying reconsideration of the designation order, but this petition (No. 24,199) was dismissed by the Court on June 25, 1970. Two other organizations, Citizens Communication Center (C.C.C.) and Black Efforts For Soul In Television (BEST) and individuals associated therewith also petitioned the Commission for reconsideration of the Policy Statement. The Commission considered the petitions for reconsideration of the Policy Statement together and denied them in all respects in a Memorandum Opinion and Order released on July 21, 1970 (24 F.C.C.2d 383 (1970)). Thereupon the parties who had sought reconsideration before the Commission petitioned this Court for review of that order and of the Policy Statement, and these cases were consolidated by an order of the Court on September 29, 1970.

The applications of Community and Hampton Roads were filed in reliance upon the fact that the Communications Act of 1934, as amended, limits an incumbent's right to a frequency to the three-year license period and precludes the granting of rights or special concessions to an incumbent merely because it is operating on the frequency. Petitioners also relied on continuing and uncontradicted precedent of the FCC to the effect that a comparative hearing in the broadcast field consists of the offering and weighing of evidence on various comparative factors which comprise the public interest

standard, including such factors as the extent to which ownership would be integrated into management and operation, local ownership, and diversification of control of communications media.

The Policy Statement On Comparative Hearings Involving Regular Renewal Applicants destroys all of the foregoing factors on which petitioners relied. Petitioners may be deprived of any hearing at all on their applications and the ground rules for any comparative hearings which are to be undertaken have been drastically changed. Petitioners are faced with hearings where a controlling advantage is given to the incumbent merely because it is the incumbent. Substantive rights have been destroyed and binding new rules have been laid down by the new policy statement. Petitioners are persons seriously aggrieved and adversely affected by this policy statement.

SUMMARY OF ARGUMENT

The policy or rule adopted by the Commission in its Policy Statement is directly contrary to the Communications Act of 1934, to authoritative interpretations of the Act by the Supreme Court and this Court, and to the requirements of the Constitution.² The policy adopted deprives petitioners of the full comparative hearing to which they are entitled under Sec. 309(e) of the Act and the doctrine of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945). The policy also violates the Constitution by excluding from consideration in the hearing the First

²Petitioners contend that what is held out by the Commission to be merely a statement of policy is in fact a rule which could only be adopted after rule-making proceedings. (See below.) However, even if it is merely a statement of policy, it should be set aside by the Court because the policy adopted exceeds the statutory authority of the Commission, violates the Constitution, and deprives petitioners of their rights.

Amendment requirement of diversification of the media. The issuance of a broadcasting license, new or renewal, is a governmental act. The Commission cannot act in a manner contrary to or inconsistent with the First Amendment. That is to say, the Commission must take into account the Constitution, and specifically the First Amendment, in all its actions. Thus it cannot exclude from consideration in a hearing leading to the issuance of a license the question whether a grant of one or another application would be more consistent with the diversification requirement of the First Amendment. However, that is what the Commission has done in its Policy Statement.

The limitation of the hearing to the single factor of the past performance of the incumbent broadcaster, the granting of a preference for such past performance if it is substantial, and the provision that the preference for substantial past performance shall be a controlling preference are contrary to established law, arbitrary and capricious, and violative of due process. Moreover, the effect of these provisions of the Policy Statement, individually and collectively, is to grant to the incumbent licensee rights in the broadcast channel beyond the terms, conditions and periods of the license, in contravention of the express provisions of Sections 301, 304, 307(d) and 309(h) of the Communications Act. (47 U.S.C.A. §§ 301, 304, 307(d) and 309(h).)

The Policy Statement works a fundamental change in the rules governing the renewal of broadcast licenses, and it deprives petitioners and other members of the public of substantial rights heretofore accorded them. Further, the Commission violated the Administrative Procedure Act by adopting these new rules without complying with the required procedures for rule making.

In the Policy Statement the Commission has undertaken to legislate for the benefit of the vested interests of the broadcasting

industry, and contrary to the interests of the public on whose behalf it is supposed to regulate that industry. Both in its language and in its actions under the Policy Statement the Commission has demonstrated a strong bias in favor of incumbent licensees and a marked hostility towards members of the public, such as petitioners, who have dared exercise their lawful right to challenge the renewal of a broadcast license. In the process, the Commission has abandoned in substantial measure its regulatory responsibility under the Communications Act, as amended. Corrective action by this Court is required to secure the lawful rights of petitioners and others so situated and to safeguard the public interest and the collective First Amendment rights of the people.

ARGUMENT

**1. A COMPETING APPLICANT IS ENTITLED BY LAW TO
A FULL COMPARATIVE HEARING ON THE MERITS
OF HIS APPLICATION BEFORE A MUTUALLY EXCLU-
SIVE APPLICATION CAN BE GRANTED.**

The Policy Statement provides for a two-phase hearing, in the first of which only the past performance of the renewal applicant is to be considered. It further provides that the renewal application may be granted and the competing application denied on the basis of the record in the first phase alone (22 F.C.C.2d at 428). This is referred to as the "summary judgment" procedure.³ Such a grant of one application and the concomitant denial of the other violates

³The Policy Statement provides for a first phase and second phase of the hearing, but since a license can be granted to the renewal applicant, and the competing application denied, on the basis of the first phase alone, the proceedings in the first phase must meet the statutory requirements for a hearing and afford the competing applicant due process of law, or the competing applicant is denied a proper hearing and due process.

the Communications Act of 1934 as amended. Under the Act an applicant has a right to a full hearing on his application before it can be denied. Moreover, under the doctrine of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), an applicant has a right to a comparative hearing on his application before a mutually-exclusive application may be granted.

An application for a construction permit is filed under Section 308 of the Communications Act of 1934, 47 U.S.C.A. § 308, as amended. The Commission's proceedings with respect to such an application are governed by Section 309 of the Act, 47 U.S.C.A. § 309, as amended, which states in paragraph (a):

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Paragraph (e) of Section 309 states in pertinent part:

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate" (47 U.S.C.A. § 309(e).)

In the case of an application in competition with a renewal application, the facilities specified are the same as those specified in the renewal application, so the Commission is unable to make the finding required by 309(a) that the public interest, convenience, and necessity would be served by granting the competing application. *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 330 (1945). Accordingly, under § 309(e), the competing application must be designated for a hearing. However, it should be noted that Section 309(e) states that the Commission shall designate *the application* for hearing, and that any hearing *upon such application* shall be a *full* hearing. On its face the statutory requirement of a full hearing on the application is not met by merely making the applicant a party to a bobtailed hearing on someone else's application. Yet that is what the Commission is apparently trying to do in its Policy Statement by making the competing applicant a party to the first phase hearing on the renewal application, while denying him the right to introduce any evidence on the merits of his own application. Such a procedure does not satisfy the statutory requirement of a full hearing upon the competing party's application.

Further, under Section 307(c) and *Ashbacker, supra*, the renewal application cannot be granted because of the mutual exclusivity between the applications requiring a comparative hearing. Manifestly, when competing applications are designated for a consolidated hearing, it cannot be a hearing on only one of the applications as the Policy Statement provides, for under the statute each of the parties is entitled to a hearing on its own application.

In *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), one of two mutually exclusive applications was granted without a hearing and the other was designated for a hearing. The Supreme Court stated:

"We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing *of the other*. For if the grant of one effectively precludes the other, *the statutory right to a hearing* which Congress has accorded applicants *before denials of their applications* becomes an empty thing. We think that is the case here." (326 U.S. at 330.) (Emphasis added.)

The Court stated that the procedure adopted in *Ashbacker*:

"... is in effect to make its [the designated applicant's] hearing a rehearing on the grant of the competitor's license rather than a hearing *on the merits of its own application*. That may satisfy the strict letter of the law but certainly not its spirit or intent." (326 U.S. at 331.) (Emphasis added.)

The "summary judgment" provision of the Policy Statement would not give the competing applicant *any* hearing on the merits of its own application. The competing applicant is given only a chance to participate in a hearing on whether the renewal applicant's license should be granted. The express holding of *Ashbacker* is directly applicable here. After stating "Congress has granted applicants a right to a hearing on their applications for station licenses" (326 U.S. at 333) and noting that it was not for the Court to decide the wisdom of the policy adopted by the Congress, the Court stated:

"We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." (326 U.S. at 333.)

Thus the Commission can neither grant the renewal application nor deny the competing application after a first phase hearing devoted solely to the renewal applicant.

The only difference between the Policy Statement procedure and that of *Ashbacker* is that under the Policy Statement the Commission proposes to hold a hearing on the renewal application before granting it, while in *Ashbacker*, the grant was made outright. However, the basic objection to the procedure followed in *Ashbacker* was the failure to hold a hearing on the merits of *both* applications prior to the grant of one, and that objection applies with full force to the procedure proposed in the Policy Statement. The so-called "summary judgment" procedure is simply unlawful.

It appears the Commission's adoption of the summary judgment procedure is based on an attempt to read into the clear language of Section 309(e) and *Ashbacker* an exception which is not there. To support its denial of a hearing on the competing application, the Commission relies upon the fact that what is involved in this situation is a contest between a new applicant and a renewal applicant, rather than a contest between two new applicants. Thus reference is made to the footnote at the start of the Commission's 1965 Policy Statement On Comparative Broadcast Hearings, 1 F.C.C.2d 393, which states:

"This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." (1 F.C.C.2d at 393.)

Whatever the differences between the two situations may be, however, they do not diminish the statutory rights of a competing applicant to a full hearing on his application prior to the grant of a license to the renewal applicant. While many of the comparative hearings held in the past were between new applicants, the reason

why a comparative hearing was held in such cases was not because they were between new applicants but because the applications were mutually exclusive.

Under *Ashbacker* it is mutual exclusivity between broadcast applications which requires that a comparative hearing be held, and whether either or both parties are new applicants or existing stations is immaterial. The provision for a hearing in Section 309(e) applies to "any application" which cannot be granted, and the language is mandatory.

As indicated above, the Supreme Court in *Ashbacker* stated flatly:

"Congress has granted applicants a right to a hearing on their applications for station licenses." (326 U.S. at 333.)

There is no room in the statute or in *Ashbacker* for the Commission to carve out of this grant of a hearing to any applicant an exception for applications in competition with renewal applications. The Commission is bound by the express language of the statute and the authoritative interpretation thereof by the Supreme Court to afford competing applicants a full hearing on the merits of their applications before a license is granted to a renewal applicant.

Even if the language of the statute and the *Ashbacker* case itself were not directly applicable and dispositive of this question, as they are, the development of the law since *Ashbacker* makes it clear that the Commission's attempted distinction is frivolous and must be rejected. *Ashbacker* was not an isolated case or an aberration in the law. The principle established in that case, that where there are mutually exclusive applications there must be a hearing on both before either can be granted, has become firmly established in the law in a wide variety of circumstances, to the extent that it has come to be recognized by this Court and others as an element of

due process of law. See *Northwest Airlines v. Civil Aeronautics Board*, 90 U.S. App. D.C. 158, 194 F.2d 339, 342 n. 3 (1952); *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 349 F.2d 587, 590 (10 Cir., 1965). This principle is sometimes called the doctrine of the *Ashbacker* case, *Mohawk Airlines, Inc. v. C.A.B.*, 412 F.2d 8, 9 (2 Cir., 1969); *Mass Communicators, Inc. v. F.C.C.* 105 U.S. App. D.C. 277, 266 F.2d 681, 682 (1959); *Radio Cincinnati v. Federal Communications Comm'n*, 85 U.S. App. D.C. 292, 177 F.2d 92, 94 (1949); sometimes "the *Ashbacker* doctrine," *Sayger v. F.C.C.*, 914 U.S. App. D.C. 112, 312 F.2d 352, 356 (1961); *Ranger v. F.C.C.*, 111 U.S. App. D.C. 44, 294 F.2d 240, 243 (1961); *Ridge Radio Corp. v. F.C.C.*, 110 U.S. App. D.C. 277, 292 F.2d 770, 773 (1961); and sometimes "the *Ashbacker* rule," *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 108 U.S. App. D.C. 409, 283 F.2d 204, 221 (1960); or "principle," *Eastern Air Lines, Inc. v. Civil Aeronautics Board*, 271 F.2d 752, 756 (2 Cir., 1959). At other times the right to a hearing is referred to as "Ashbacker rights," *National Airlines v. C.A.B.*, 129 U.S. App. D.C. 180, 392 F.2d 504, 510 (1968) or a right under Ashbacker; *Pan American-Grace Airways, Inc. v. C.A.B.*, 119 U.S. App. D.C. 326, 342 F.2d 905, 910 (1965). Often language to the effect that a comparative hearing must be held on mutually exclusive applications is used, citing *Ashbacker*. See *Consolidated Nine, Inc. v. F.C.C.*, 131 U.S. App. D.C. 179, 403 F.2d 585, 589 (1968); *Natick Broadcast Associates, Inc. v. F.C.C.*, 128 U.S. App. D.C. 203, 385 F.2d 985, 986 (1967); *Delta Air Lines v. C.A.B.*, 97 U.S. App. D.C. 46, 228 F.2d 17, 21 (1955); *Radio Relay Corporation v. F.C.C.*, 409 F.2d 322, 328 (2 Cir., 1969); *Parr v. F.C.C.*, 120 U.S. App. D.C. 154, 344 F.2d 539, 540 n. 3 (1965); *Kessler v. F.C.C.*, 117 U.S. App. D.C. 130, 326 F.2d 673, 687 (1963); *Century Broadcasting Corporation v. F.C.C.*, 114 U.S. App. D.C. 59, 310 F.2d 864, 866 (1962); *L. B. Wilson, Inc. v. F.C.C.*, 130 U.S. App. D.C. 156, 397 F.2d 717, 719 (1968).

Whatever terminology is used, the principle is the same. It has become widely accepted in the field of administrative law as a sound and fair rule for resolving situations where mutually-exclusive applications are presented to an administrative agency.

Far from being limited to new broadcast applications to the FCC, the Ashbacker doctrine has also been applied to common carrier applications to that agency, *Radio Relay Corporation v. F.C.C.*, 400 F.2d 322, 328 (2 Cir. 1969), and to applications to other agencies such as the Civil Aeronautics Board and the Federal Power Commission (see cases cited above) when such applications were mutually exclusive. Of particular significance is the fact that the *Ashbacker* rule has been applied by this Court in the past to the very situation at issue here, application mutually exclusive with license renewal applications, *Community Broadcasting Corporation v. F.C.C.*, 124 U.S. App. D.C. 230, 363 F.2d 717, 720 (1966); *South Florida Television Corp. v. Federal Communications Comm'n.*, 121 U.S. App. D.C. 293, 349 F.2d 971 (1965).

In short, it is simply too late in the day for the Commission to attempt to grant one of two mutually exclusive applications without conducting a full comparative hearing on both. The Policy Statement constitutes an announcement in advance of the Commission's intention to violate its statutory authority by depriving competing applicants of the hearing to which they are entitled by law. It should be set aside by this Court.

2. THE PROVISION THAT A PREFERENCE FOR SUBSTANTIAL PAST PERFORMANCE SHALL BE CONCLUSIVE OF THE ISSUES IN THE CASE IS CONTRARY TO THE COMMUNICATIONS ACT, ARBITRARY AND CAPRICIOUS, AND DEPRIVES THE COMPETING APPLICANT OF DUE PROCESS OF LAW.

The Policy statement provides for a hearing on the competing applicant's proposal in phase two if the renewal application is not granted under the summary judgment procedure at the conclusion of phase one (22 F.C.C. 2d at 426, 428). As shown above, the *Ashbacker* doctrine prevents the granting of the renewal application at the conclusion of phase one as a matter of law, so the summary judgment procedure cannot be followed.

Eliminating the summary judgment procedure from the Policy Statement apparently leaves what the Policy Statement calls for in cases where a summary judgment is not awarded—a full comparative hearing between the parties on all relevant factors, with the factor of the renewal applicant's past performance the "critical" (22 F.C.C. 2d at 426) and "controlling" (22 F.C.C. 2d at 425) factor. In the context of a comparative hearing, however, the determinative significance given to the matter of the renewal applicant's past performance is unlawful. Under the Policy Statement the renewal applicant is to receive a preference for substantial service to the community, without serious deficiencies, during the last license period (22 F.C.C. 2d at 425). The Commission refers to the preference for substantial service as "controlling" (22 F.C.C. 2d at 425) and indicates that even if a full hearing on the competing application is held, the preference is still controlling. (22 F.C.C. 2d at 428.) Granting such a preference destroys the competing applicant's statutory right to a hearing on his application.

It has already been shown in the first section of this brief that where there are mutually exclusive applications, both are entitled to

a hearing before either can be granted. *Ashbacker, supra*. Since only one of the applications can be granted, it has long been recognized that as a practical necessity, a comparative hearing must be held to determine whether the grant of one or the other will better serve the public interest, convenience, and necessity. As the Supreme Court said in *National Broadcasting Co. v. United States*, 319 U.S. 190, (1943) when confronted with the argument that the "public interest" referred only to interference and technical matters:

If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity". See *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.Ed. 656. (319 U.S. at 216-217)

Because the need for a comparative hearing follows inevitably from the Supreme Court's ruling in *Ashbacker*, that case is usually cited for the proposition that where applications are mutually exclusive, a comparative hearing must be held. See, e.g., *Century Broadcasting Corporation v. F.C.C.*, 114 U.S. App. D.C. 59, 310 F.2d 864, 866 (1962); *Parr v. F.C.C.*, 120 U.S. App. D.C. 154, 344 F.2d 539, n. 3 (1965); *Radio Cincinnati v. Federal Communications Commission*, 85 U.S. App. D.C. 292, 177 F.2d 92, 94 (1949). Since applications by a new applicant and a renewal applicant are mutually exclusive, under the statute and the *Ashbacker* doctrine, a comparative hearing between the two must be held.

For the Commission to announce in advance that the single factor of the past performance of the renewal applicant will be con-

trolling of the outcome of the case is to make the competing party's hearing on the merits of his application "an empty thing." *Ashbacker*, 326 U.S. at 330. The right to a hearing upon an application manifestly contemplates that the case will be decided under all relevant criteria. If the decision has already been made (*Ashbacker*) or if the decision cannot be affected by the showing made (the Policy Statement), the right to a hearing on the merits of an application is meaningless. The hearing on the merits of the competing applicant's proposal provided by the Policy Statement; that is, a hearing in the face of a controlling preference on the factor of the renewal applicant's past performance, like a hearing after the facility has been granted to someone else, "may satisfy the strict letter of the law but certainly not its spirit or intent." *Ashbacker*, 326 U.S. at 331.

The requirements of a meaningful comparative hearing have been spelled out by this Court on a number of occasions. In *Scripps-Howard Radio v. Federal Communications Comm.*, 89 U.S. App. D.C. 13, 189 F.2d 677, 680, cert. denied 342 U.S. 830 (1951) it was stated:

The guiding standards, however stated, must in the end be translated into those of the statute, namely, the "public convenience, interest, or necessity." 47 U.S.C. § 307(a), 47 U.S.C.A. § 307(a). Superiority of one applicant over another in one or more phases of qualification or operational ability does not necessarily constitute superiority under the statutory standards. Nor may the Commission or the reviewing court simply add up the factors as to which each is superior and decide according to the numerical result. This would eliminate the exercise of judgment as to where lies the greater public interest. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 1940, 309 U.S. 134, 137-138, 60 S.Ct. 437, 84 L.Ed. 656. There must be a weighing of the relative importance of the several factors involved.

Assuming minimal qualifications in all essential respects, superiority in those matters most conducive to the public interest will outweigh superiority of a rival in others. Similarly, a slight degree of superiority in several factors might be more than offset by substantial inferiority in one.

In *Johnston Broadcasting Co. v. F.C.C.*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949), the Court said, in part:

"A choice between two applicants involves more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified, but if a choice must be made, the question is which is the better qualified . . . Comparative qualities and not mere positive characteristics must then be considered. . . . The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only . . . It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases." (175 F.2d at 356-7.)

The Commission's abandonment of the established principle that the decision in any comparative hearing is to depend upon the circumstances of that particular case, based upon the relative merits of the applicants under all relevant criteria, and the adoption of a rule that in every case a preference for the renewal applicant on the factor of past performance shall be controlling, is in violation of the full hearing requirement of Section 309(e) of the Act, and the governing law.

The rule promulgated by the Commission in favor of renewal applicants is also forbidden by Sections 301, 304, 307 and 309(h) of the Communications Act, as interpreted in several leading cases.

In *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), the Supreme Court said:

"The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." (309 U.S. at 475).

In *Ashbacker, supra*, the Supreme Court said that "No licensee obtains any vested interest in any frequency." (326 U.S. at 331). The Court cited Sections 301, 304, 307, and 309 of the Communications Act in support of that principle.

Another case demonstrating the illegality of the new policy statement is *Transcontinent Television Corporation v. FCC*, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962). In that case the Commission, after rule making, ordered KERO-TV, Bakersfield, to shift from Channel 10 to Channel 23 at the end of its license term. KERO-TV (Marietta) argued, in part, that it had continuing rights to the VHF channel which could only be terminated after hearing in accordance with the language of Section 316(a) of the Communications Act. Section 316 provides, in relevant part:

"Any station license . . . may be modified by the Commission either for a limited time or for the duration of the term thereof . . . No such order of modification shall become final until the holder of the license . . . shall have been given reasonable opportunity . . . to show cause by public hearing, if requested, why such order of modification should not issue."

The Court noted that the Commission

"... contends that it did not modify Marietta's license since the deletion of Channel 10 was not to become effective during the prescribed term of the license."
(308 F.2d at 341)

It was the Commission in that case who insisted that the right to a license is for a finite period and that the statutory plan gives a licensee no rights beyond the term of his license and no right to preferential treatment when his three-year license period expires. The Court, in the course of its discussion, considered Marietta's argument that the provisions of Section 9(b) of the APA, when read with Section 307(d) of the Communications Act, requires the result that

"... when a licensee, in accordance with agency rules, has made timely and sufficient application for a renewal, no license which authorizes any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." (308 F.2d at 342)

The Court adopted the Commission's point of view, in part, because of

"... the provisions of the Act (1) indicative of an unwillingness on the part of Congress to permit a broadcasting license for a term in excess of three years [footnote citing Section 307(d)], (2) that no license shall be construed to create any right beyond its terms, conditions, and periods [footnote citing Section 301], (3) that the applicant shall waive any claim to the use of any particular frequency 'because of the previous use of the same, whether by license or otherwise' [footnote citing Section 304], and (4) that 'the station license shall not vest in the licensee any right to operate the station nor any right in the

use of the frequencies designated in the license beyond the term thereof. . . .’ [footnote citing Section 309(h)].” (308 F.2d at 341-2)

Thus, rights exist in a license only for the finite term of the license and no preferences attach from the fact of incumbency.

The 1952 amendments to the Communications Act are also relevant here. Before those amendments, Section 307(d) of the Act contained a provision that the granting of an application for the renewal of a license “shall be limited to and governed by the same considerations and practice which affect the granting of original applications.” That provision was deleted by the 1952 amendments and Congress further amended Section 307(d) by instructing the Commission to use the standard of “public interest, convenience and necessity” in passing upon renewal applications. That, of course, is the same standard as for original applications. Also incorporated into Section 307(d) at that time was the following provision:

“In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.”

Reference to the Senate and House Reports (1 RR 10: 278; 1 RR 10: 307-8) on the 1952 amendments shows that the purpose of the deletion of the language “shall be limited to and governed by [etc.]” was to permit the Commission to simplify its processing of renewal applications by reducing the quantity of material the applicant had to file as part of its renewal application. For example, if a station was already in operation, the Commission had no reason to call for

or to consider the detailed financial information required of an applicant for new facilities. Nor did the Commission need to require or to consider the same technical showing on renewal as on an original application. The Senate and House Reports do not suggest that any change was intended in the way in which the Commission should dispose of a renewal application challenged by a new application for the same facility.

Indeed, the decision by Congress to add the test of "public interest, convenience and necessity" to consideration of renewals is indicative of the intention to require the Commission to judge a renewal applicant by the same standards by which it would judge an initial applicant and to apply the same criteria to both in an impartial way. The fact that no preferential rights were intended to be extended to the renewal applicant is also shown by the fact that Congress retained in the Act the provisions to the effect that "no . . . license shall be construed to create any right beyond the terms, conditions and periods of the license" (Sec. 301); that an applicant waives any claim to a frequency "because of the previous use of the same" (Sec. 304); that a renewal of license may be granted "for a term not to exceed three years" (Sec. 307(c)); and that a license does "not vest in the licensee any right . . . in the use of the frequencies . . . beyond the term thereof" (Sec. 309(h)). *Transcontinent* followed the 1952 amendments by 10 years, and that case reaffirms the finite nature of a license and the prohibition against any vested or special rights arising by virtue of occupancy. Chairman Hyde, whose tenure with the Commission spanned this entire period (and longer), has said the following about the 1952 amendments:

I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test

is exactly the same, the intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. *Policy Statement on Comparative Broadcast Hearings* (Dissenting Statement of Commissioner Hyde), 1 FCC 2d 393, 403 (1965).

The standard of substantial performance is also too vague and indefinite to be a basis for a preference in a comparative hearing. The purpose for which a standard is set is highly relevant to the question whether it is sufficiently precise. Here the purpose is to award a preference in a comparative hearing. The term "substantial" does not contain any comparative element, and there is no absolute scale against which the performance can be measured. The competing applicant has no past performance (except perhaps at another station, and that performance would presumably be weighed by the "unusually good" standard), so there can be no comparison between the parties to the hearing on this factor. Neither can there be any meaningful comparison with other stations. (See the Commission's ambiguous reference to this matter at 22 FCC 2d at 426) If another station's performance is better - is that to say the renewal applicant's is not substantial? If another station's performance is poorer - is that to say the renewal applicant's is substantial? If there are stations that are better and stations that are poorer, as may well be the case, is the renewal applicant's programming substantial? One is back at the starting point!

Moreover, how is a ruling that past performance is or is not substantial to be reviewed by a court? For practical purposes, past performance means past programming, and the Commission has no standards whatever for judging whether programming is good, bad, or indifferent. That is not to say there can be no comparisons *between* stations or proposals to say which is better. The unusually good or poor standard is workable, for it is a relative measure of one

station against others. However, the Commission has no absolute standards at all, and substantial is an absolute, as opposed to a relative measure.

In the Policy Statement the Commission says the standards will emerge as cases are decided (22 FCC 2d at 426). Yet a hearing examiner who recently conducted a hearing in such a case ended up lamenting the Commission's failure to provide any objective programming standards. See *RKO General, Inc.* ___ FCC 2d ___, 16 RR2d 1181, 1271 (1969).

The Commission's reliance upon such words as "ample," "solid," and "good" as equivalent to "substantial" merely serves to emphasize how obscure and uncertain, and thus arbitrary, a standard the Commission has decreed for a preference. This Court has recently pointed out that

"... the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards."

Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082, 1096 (1968). To say that programming is substantial or good or solid or ample is hardly different from saying it is in the public interest. There has been no narrowing by definable standards here. The Commission has not defined a standard that can be measured either absolutely or relatively. Such a standard must be rejected as a basis for a preference in a comparative hearing.

The rule that a preference for the renewal applicant on the factor of past performance shall be controlling is also arbitrary and capricious. It is so because past performance is not the only factor relevant to the question at issue. Other factors are also highly relevant to the public interest in "the larger and more effective use of radio." (Sec. 303(g) of the Act.) Among these are diversification of the media, the Commission's exclusion of which is discussed

herein in detail, local as opposed to absentee ownership, integration of ownership into management, and significant differences in the services which the competing applicants propose to offer to the community. The Commission cannot make a legally sufficient determination whether the grant of one or the other of the applications before it would better serve the public interest, convenience, or necessity without considering these matters.

Adoption of a rule giving a renewal applicant a controlling preference for substantial service deprives the competing applicant of his statutory right to a hearing, gives the renewal applicant a vested interest in the frequency, and is arbitrary and capricious. This provision of the Policy Statement should be set aside by the Court.

3. THE COMMISSION'S EXCLUSION OF THE FACTOR OF DIVERSIFICATION OF THE MEDIA FROM COMPARATIVE LICENSE RENEWAL HEARINGS IS AN ABUSE OF DISCRETION AND CONTRARY TO THE REQUIREMENTS OF THE FIRST AMENDMENT.

In the Policy Statement the Commission excludes from consideration in comparative hearings between new and renewal applicants the question of diversification of the media (22 F.C.C.2d at 427-428). It does so by first noting "the question of the applicability here of our policy of diversification of the media of mass communications" (22 F.C.C.2d at 427), and by stating that "as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry." (22 F.C.C.2d at 427.) By discussing this problem in terms of its policies and processes and "restructuring the industry" and like generalities, the Commission obscures the serious Constitutional question at issue here. That question is: Under the First Amendment can the Commission issue a broadcasting license to one of two competing applicants without even taking into consideration in the comparative hearing between them the factor of diversification of the media of mass communications? We submit that the answer to this question is "No"!

Diversification of the media is not merely a policy of the Commission which can be applied or not applied willy-nilly as the Commission sees fit. It is an essential aspect of the public interest and ultimately a requirement of the First Amendment. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Since the issuance of a broadcast license is a governmental act (See *Graves v. People of State of New York*, 306 U.S. 466, 477 (1939)), and it is fundamental that in all its actions, the government is subject to the requirements of the Bill of Rights (*Barenblatt v. United States*, 360 U.S. 109, 112 (1959); *Feldman v. United States*, 322 U.S. 487, 490 (1944)), including the First Amendment (see *Public Utilities Comm. v. Pollak*,

343 U.S. 451, 462-463 (1952)), the Commission cannot issue a license without considering the question of diversification of the media.

No government agency can affirmatively exclude from its decisional processes the Constitutional implications of a contemplated action. For an agency to do so is for it to act without regard for whether its action is in accord with the Constitution, or whether it may be violative of Constitutional rights. That an agency may act by either promulgating rules of general application or by *ad hoc* rulings in particular cases does not relieve it of the obligation, when it does act, of acting in accordance with the public interest. *Wait Radio v. F.C.C.*, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (1969). Even more fundamental is the obligation, if the agency does act, to act in accordance with the requirements of the Constitution.

Apparently the Commission does not deny the strong public interest in diversifying the media, see First Report and Order (Amendment of the multiple ownership rules), 22 F.C.C.2d 306, 18 R.R.2d 1735, 1740-1746 (1970), but it takes the view that the "renewal process" is not a proper place for applying the policy of diversification.

Under the statute, however, there is no "renewal process," there is only a *licensing* process, for all aspects of which the standard is the same, that of the public interest, convenience, and necessity. Indeed, the limitation of the license to three years and the repeated statements that no rights are to vest in the licensee beyond the term of the license would seem to indicate that the renewing of licenses and the granting of new licenses were intended to be intermingled in this licensing process.

Moreover, the Commission conveniently overlooks the fact that what it terms its policy of diversification is Constitutionally based. See the *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965), citing as the basis for the diversification policy *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956); and *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F.2d 677 (1951), *cert. denied* 342 U.S. 830 (1951). In view of this Constitutional basis for the Commission's policy, the question might well be stated as follows: If the FCC had never adopted a policy favoring diversification of the media, would that factor have to be considered in a comparative hearing between a new and renewal applicant? We submit that it would, for diversification of the media as a factor under the public interest standard is mandated by the First Amendment, irrespective of any policy of the Commission.

The Supreme Court's most recent, and most extensive, discussion of the applicability of the First Amendment to broadcasting appears in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). In that case, the broadcasters had argued that the Commission's personal attack and editorializing rules violated the broadcaster's right to free speech. The Court rejected this argument after a detailed analysis of the development of broadcasting and the regulatory structure. However, what is of particular significance for present purposes is what the Court, after rejecting the argument of the broadcasters, proceeded to say about the applicability of the First Amendment to broadcasting. The Court stated:

"This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequen-

cies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362, 75 S.Ct. 855, 857-858, 99 L.Ed. 1147 (1955); 2 Z. Chafee, *Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (395 U.S. at 389-390.)

Although the specific question of the ownership of broadcasting stations was not before the Court in *Red Lion*, the language of the Court leaves little room for doubt that the First Amendment requires diversification of the ownership of the mass media. The people have a collective Constitutional right to have the broadcast medium function consistently with the ends and purposes of the First Amendment. *Red Lion, supra*. In *Associated Press v. United States*, 326 U.S. 1, 20 (1945), the Court stated that the First Amendment

“rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”

It cannot seriously be denied that the First Amendment requires diverse and antagonistic sources of information. This Court recently had occasion to refer to “the diversity demanded by the First Amendment” in *National Ass’n of Theatre Owners v. F.C.C.*, 136 U.S. App. D.C. 352, 420 F.2d 194, 207 (1969). See also *Joseph v. F.C.C.*, 131 U.S. App. D.C. 207, 404 F.2d 207, 211 (1968); and *Scripps-Howard Radio, Inc. v. F.C.C.*, 89 U.S. App. D.C. 13, 19, 189 F.2d 677, 683; *cert. denied* 342 U.S. 830 (1951). And see the concurring opinion of Tamm, J., in *Hale v. F.C.C.*, — U.S. App. D.C. —, 425 F.2d 556 (1970).

Does this diversity apply to the ownership of the media? Clearly it must. As this Court stated in *Scripps-Howard, supra*,

“News communicated to the public is subject to selection and, through selection, to editing, and . . . in addition there may be diversity in methods, manner and emphasis of presentation.” (89 U.S. App. D.C. at 19, 189 F.2d at 683.)

See also the Commission’s discussion of this aspect of the question in its *First Report and Order, supra*, 18 R.R.2d at 1741. Moreover, the need for diversity of ownership is heightened, not lessened, by

the Commission's Fairness Doctrine which the Supreme Court upheld in *Red Lion, supra*.

The cornerstone of the Fairness Doctrine is the discretion of the licensee. The extraordinary discretion vested in the individual broadcaster demands that the ownership of the media be widely dispersed. The Commission has said repeatedly that such matters as *what* constitutes a controversial issue, and *who* shall be a spokesman for opposing viewpoints, and *what* constitutes fair coverage of both sides of a controversial question, and *how* shall opposing views be presented, are within the discretion of the licensee. See, e.g., *Applicability Of The Fairness Doctrine In The Handling Of Controversial Issues of Public Importance*, — F.C.C. —, 2 R.R.2d 1901 (1964). That being the case, how is fairness in the discussion of controversial issues achieved when the licensee of several of the dominant broadcasting stations in the community is a single individual, who also controls the only newspapers in the city? In such a situation, the Fairness Doctrine works against the free and open discussion of issues, for the discretion and thus the control is concentrated, not diversified.

If diversity of the sources of news and information is to be meaningful, it must include diversity of the ownership of the mass media.

It should be noted that the question whether diversification of ownership is a requirement of the First Amendment has not arisen heretofore in the present context for the reason that it has been a factor taken into consideration in all Commission actions, either expressly or by implication. Even if the Commission did not advert to the factor of diversification in a decision, the presumption of regularity which accompanies governmental action would imply that diversification had at least been considered. Thus the burden on one attacking a decision would have been to show that the grant

was in fact unconstitutional. In the Policy Statement, however, the Commission for the first time has *excluded from consideration* in its license renewals, where competing applications are filed, the factor of diversification. Under these circumstances, the question is not whether a particular grant would result in an unconstitutional concentration of control. The question is whether, consistent with its obligations under the First Amendment, the Commission can exclude from consideration in a comparative license renewal hearing, the question of diversification itself. In view of the Commission's mandate under First Amendment to diversify the sources of news and information, it would seem apparent that the Commission cannot exclude this factor. For the Commission to announce in advance that it is going to act in license renewal situations without regard for the requirements of the First Amendment, as it has done in the Policy Statement, is a clear abuse of discretion and unlawful. This provision of the Policy Statement should be set aside by the Court.

**4. THE COMMISSION HAS EXCEEDED ITS LAWFUL
AUTHORITY AND VIOLATED THE RULE MAKING
PROVISIONS OF THE ADMINISTRATIVE PROCE-
DURE ACT.**

The Commission has exceeded its lawful authority in adopting the Policy Statement, the major provisions of which are contrary to the Communications Act of 1934. What the Commission is doing, quite simply, is legislating under the guise of a policy statement. It is pertinent that legislation had been introduced in Congress to change the Communications Act to accomplish substantially what the Commission has done in the Policy Statement, i.e., protect the broadcasting industry from competing applications at license renewal time. Significantly, the interest of the Congress in providing such protection had noticeably cooled at the time the Commission acted.

This aspect of the Policy Statement is of particular moment to petitioners, for even if the considerable political muscle of the industry had succeeded and the law had been changed by the Congress, the new provisions would likely have been prospective and not have applied to applications already on file, such as those of petitioners.⁴ However, in issuing the Policy Statement, in reflection of a manifest appreciation that Congressional action amending the Act was otherwise required, the Commission engaged in the necessary charade that it was merely restating existing law. Accordingly, the new rules were made applicable to pending as well as future applications—of which latter there have been none since the Policy Statement issued.

Major changes in regulatory policy are to be made by Congress, not by administrative agencies. *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965). An administrative agency has power only to interpret the law, not to make law. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *Northern Nat. Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8 Cir. 1960). Regulation by an agency must be in harmony with the underlying statute. *United States v. Silva*, 272 F.Supp. 46 (S.D. Cal. 1967), and a Congressional expression of purpose in a statute must be taken into account by the agency involved. *Trans-World Airlines v. C.A.B.*, 128 U.S. App. D.C. 126, 385 F.2d 648, *cert. denied* 390 U.S. 944 (1968). Regulations that are inconsistent with the statutory mandate or that frustrate the Congressional policy underlying a statute should be struck down. *N.L.R.B. v. Brown*, 380 U.S. 278

⁴The proposed legislation provided in substance that the Commission could not accept for filing application in competition with renewal applications unless the Commission had found first that it would not be in the public interest to renew the license. (See, e.g., Hearings on S. 2004 [Orderly Renewals] Before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong., 1st Sess.) Since the applications of petitioners and others had already been on file for some time, they presumably would not have been affected by the changes in the Act.

291 (1965). The same is true of administrative standards not in accord with underlying law. *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 407 F.2d 307 (1968). Moreover, an agency rule must not contravene the terms of the statute under which it is adopted. *Niagara Mohawk Power Corp. v. F.P.C.*, 126 U.S. App. D.C. 376, 379 F.2d 153 (1967).

As the previous sections of this brief have shown, the Policy Statement makes major changes in the law which are directly contrary to the Communications Act of 1934. The summary-judgment procedure violates Sec. 309(e) of the Act, and the Congressional statement of purpose in Sec. 301 is frustrated by the provisions effectively granting the renewal applicant rights in the frequency extending beyond the terms of its license.

Even if these changes in the law can be made by the Commission without violating the Act, which we challenge, the failure to comply with the rule making procedures required by Section 4 of the Administrative Procedure Act (5 U.S.C.A. § 553) is unlawful. Before reaching the question of when a policy statement is a rule and when it is a policy statement, it will be helpful to consider this case in the light of the purpose which the rule making provisions of the APA were intended to serve.

The rule making provisions of the Administrative Procedures Act were designed to assure fairness and mature consideration of rules of general application. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). These rules also permit orderly judicial review of rules of general application adopted by administrative agencies. Rather than repeating here the cogent arguments which have already been made by Commissioner Johnson, we shall incorporate by reference his dissenting statement on the denial of reconsideration of the Policy Statement (24 F.C.C.2d 383, 386 (1970)). Congress having provided for judicial review of rule making proceed-

ings, the importance of the changes wrought by the Policy Statement to the public interest are a sound and sufficient basis for the Court to find this policy statement to be a rule.

Rule making proceedings should have been followed, and should be required, before rules such as those in the Policy Statement are adopted, particularly where the rules, pertinently the Policy Statement, do not rest on sound footing. There is no factual or evidentiary support whatsoever for the asserted need for *stability* and *predictability* in the broadcasting industry on which the Commission purports to rely.

The concepts of stability and predictability are foreign to broadcasting. No hearing has ever considered such matters, no docket has ever been opened to investigate their importance in the broadcasting field, and the Commission has no particular expertise concerning them. Moreover, they are mere concepts. The stability of *what* is threatened? We are never told. At various places the Policy Statement refers to "stability of broadcast *operation*" (22 F.C.C.2d at 425), "the broadcast *field* thus must have stability . . ." (22 F.C.C.2d at 425); ". . . considerations of predictability and stability," (22 F.C.C.2d at 425); ". . . the stability of a large percentage of the broadcast *industry*" (22 F.C.C.2d at 428); "predictability and stability of broadcast *operations*" (22 F.C.C.2d at 429); and "to preserve the stability and predictability which are important aspects of the overall public interest" (22 F.C.C.2d at 430).

It is apparent from the vagueness and generality of the Commission's discussion that what is presented is simply a conclusion—the stability of the broadcast industry is threatened—without any supporting data or findings whatsoever. A fundamental change in the rules governing the renewal of broadcasting licenses cannot be made on so flimsy a basis.

The Commission may not lawfully assert conclusions without providing adequate explanation. In *Television Corporation of Michigan, Inc. v. F.C.C.*, 111 U.S. App. D.C. 101, 249 F.2d 730, 733 (1961), this Court said:

"The Commission's conclusion as to added service, and that this is 'clearly in the public interest,' accordingly seems to us to lack adequate explanation. As we said in the Telanserphone case:

"The expression of a bare conclusion * * * does not reveal "the basis" for the conclusion required by 47 U.S.C. § 409(b) (1952), 66 Stat. 721 (1952), 47 U.S.C.A. § 409(b). The statutory duty of this court to review the action of the Commission cannot be performed without a fuller statement of its reasons for its conclusion.'"

There is also no showing that protecting the stability of the industry, assuming it is threatened, requires the drastic action taken in the Policy Statement. Indeed, as hereinafter discussed, before the *stability* of a single broadcaster—to say nothing of the industry—could be meaningfully threatened, the Commission would have had to make a *public interest* determination that the incumbent licensee should be replaced by the challenger. If, as the Commission suggests, it is concerned about cutting off the flow of future capital into broadcasting for investment in station facilities and the like, it would appear that any problem in this area is resolved by requiring the competing applicant, if successful, to purchase such facilities at their fair market value, or reimburse the prior licensee. Surely it is not necessary to eliminate competing applicants altogether because of such considerations.

It is difficult to avoid the conclusion that what the Commission is protecting here is the future profit of the incumbent licensee, either from the operation or sale of the station. Except to the

extent that there are public interest considerations involved, the question of the profit or loss of a licensee is not a proper factor for consideration by the Commission in the licensing process. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940).

Section 2(c) of the APA (5 U.S.C. § 551(4)) defines a "rule" as

"... the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. . . ."

The Policy Statement fulfills those requirements because it is an "agency statement" which has "general" and "particular" applicability. It is also of "future effect" and is "designed to implement . . . or prescribe law or policy." The principle is also a "rule" because it (a) fixes and determines legal rights in a substantive manner, (b) creates new rights for renewal applicants which did not exist before, (c) takes away rights hitherto understood to be possessed by persons applying in competition with renewal applicants, and (d) has the effect of eliminating applications by public-spirited community groups seeking to bring a better broadcast service to an area. That the Commission has used a particular form to issue its doctrine is not determinative of the question of whether the doctrine is a rule subject to the APA notice procedures.

Certain kinds of "rules" are exempt from the notice and advance comment procedure required by Section 4 of the APA. Discussion of these exemptions will help prove that the notice and advance comment procedure is applicable to the doctrine of the renewal policy statement. Section 4(a) of the APA exempts from rule making procedures:

"... interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

The foregoing exemptions from rule making procedures are adopted almost verbatim into Section 1.412(b) and (c) of the FCC's rules. None of the stated exemptions eliminates the necessity of advance rule making in the present situation. The exemption for "interpretative rules" could not apply since the policy statement does not merely "interpret" existing policy or standards, but rather creates new guidelines for the disposition of comparative hearings. For example, to this time it has not been the law that a renewal applicant competing against a new applicant for the same channel shall be judged by the standard of "substantial" service and all other comparative factors shall be ignored if that standard has been met. Nor has it been the law that comparative hearings for a frequency may not be "comparative," but merely a determination involving one applicant.

Nor does the policy statement qualify as a "general statement of policy." The statement creates specific and definite rights for renewal applicants which were not understood to exist before, and correspondingly eliminates rights for new applicants which were understood to exist before. The rule of the policy statement is thus a substantive rule of both "general" and "particular" applicability and not a mere "general statement of policy." Manifestly the rule is not one of "agency organization." It does, however, include an aspect of "agency practice and procedure," but that is true of many substantive rules as to which advance rule making is required. As an

example, a rule listing specific television assignments in specific communities in the nation establishes the "agency practice and procedure" of accepting applications to establish television stations only on channels listed in the table of assignments. It is common for there to be an element of "practice and procedure" in a substantive rule and that element is not an excuse for ignoring the advance rule making procedures called for by Section 4 of the APA.

We come now to the exemption from the advance rule making procedures where "the agency for good cause finds . . . that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." The Commission has not sought to take advantage of this exemption since it denies that it has adopted a rule or that notice procedures might otherwise be necessary. Nevertheless, since our concern is with substance rather than form, it is appropriate to examine what the Commission said about this matter in its denial of the petitions of BEST and CCC for a rule to clarify the standards to be applied in comparative renewal hearings. The Commission said that rule making was unnecessary, first, because the petitioners (BEST and CCC) were mistaken that the new policy statement changes the law expressed in the 1965 Policy Statement On Comparative Broadcast Proceedings, and that the new policy statement "is not making new law but rather following, to a substantial degree the long-established precedent of the *Hearst Radio case*" (21 F.C.C.2d 355 (1970)). The Commission is wrong in saying that petitioners BEST and CCC were mistaken. Of course, the 1965 policy statement said that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." However, that 1965 policy statement cannot, under any stretch of the imagination, be read as eliminating from the comparative determination the factor of diversification of ownership of communications media.

Nor can the 1965 policy statement be read as eliminating in any respect from a comparative hearing the factor of integration of ownership into station operation. Indeed, the 1965 policy statement emphasized that those criteria are a vital part of the public interest determination in a comparative hearing. However, there has been issued in 1970 a policy statement which announces that the criteria of diversification of media and integration are not imbued with the public interest under certain circumstances. That is a violent and shattering change in the law, despite the effort made in the policy statement to suggest the contrary.

The Commission's attempt to use the *Hearst* case in support of its assertion that the new policy statement "is not making law" does not withstand scrutiny. The Commission's claim to a continuity in law is easily demonstrated to be erroneous. In the *Hearst* case, the Commission actually considered factors such as diversification of communications media, integration, staff plans, proposed programming, etc., along with the factor of past performance. In the ultimate evaluation it decided that past performance was the controlling factor, but it considered the other factors. Now, however, renewal applicants can get a renewal merely by showing a "substantial" past performance, and all other comparative factors are dispensed with. The factors of diversification of media and integration, among others, which have traditionally been considered affected with a public interest and a part of the comparative evaluation, cease to be affected with a public interest and are jettisoned in most renewal situations. That is a major and sweeping change that is not found in *Hearst*.

Moreover, if *Hearst* were such a "long-established" precedent, it would not have been necessary for the Commission to adopt the novel practice in recent cases of citing it in designation orders.

Several cases involving newcomers in competition with incumbents were designated for hearing after the issuance of the 1965 policy statement,⁵ but in that series of cases *Hearst* was not mentioned in the designation orders. Recently, when the Commission wanted to launch an incumbent's past performance as a criterion of major significance, it started to cite *Hearst* in orders issued in the cases involving occupied channels in Jackson, Mississippi;⁶ Boston, Massachusetts; and Norfolk, Virginia. Of course, the issuance of the new policy statement would not have been necessary if *Hearst* were actually "long-established." The *Hearst* case is not relevantly "long-established" and it is not a precedent for what the Commission is doing in the Policy Statement.

The second reason the Commission gave for dispensing with rule making procedures is that it has now used the same procedure it used to promulgate the 1965 statement; that "the area is simply not conducive to rule making"; that it is setting forth its policies "as largely developed over the years in cases" (21 F.C.C.2d at 356). It appears that no one ever took an appeal from the 1965 policy state-

⁵Included in this group of cases were (1) the applications of South Dade Broadcasting Co., Inc., and Rolands Broadcasting Co., Inc., for 1430 kc in Homestead, Florida, in competition with the renewal application of Seven League Productions, Inc. (WIII), Dockets 16432-3-4; (2) the application of Ohio Radio, Inc., for 730 kc, Bowling Green, Ohio, in competition with the renewal application of WMGS, Inc., Dockets 16290-91; and (3) the application by Voice of Los Angeles, Inc., for Channel 4, Los Angeles, in competition with the renewal application of National Broadcasting Company, Inc. (KNBC), Dockets 18602-3; among others.

⁶The order in the Jackson case was released December 5, 1969 (FCC 69-1336). It was the first order to cite *Hearst*. The Jackson order was issued in response to the direction by this Court that the incumbent on the Jackson channel must undergo a hearing in competition with newcomers. *Hearst* (WBAL) was cited in reverse; that is, the Commission said that *Hearst* would not apply because of special circumstances.

ment, so there has never been a judicial determination concerning the legality of the promulgation of that statement through issuance of a statement of policy without rule making. There is no sense in arguing now that the procedure used to adopt the 1965 statement was illegal. There are so many differences between the effects of the 1965 statement and the 1970 statement that they cannot be equated. For example, the 1965 statement retained the traditional criteria of diversification and integration as public interest factors to be evaluated. However, the new policy statement breaks with tradition and disclaims the relevancy of those factors to the public interest judgment. Secondly, the 1965 statement reaffirmed the long-established principle (reaffirmed by the 1951 *Hearst* case), that a comparative hearing is an evaluation of a variety of comparative factors, such as past performance of broadcast stations, diversification, integration, etc. On the other hand, the 1970 statement holds that a single non-comparative factor shall be controlling in renewal hearings. Thirdly, the 1965 statement treats all applicants equally and without preferential treatment, while the 1970 statement carves out an area of special rights and preferential treatment for the renewal applicant.

The Commission's suggestion that the 1970 policy statement is a statement of its policies "as largely developed over the years in cases" is simply without support. It follows from the foregoing that the fact that the 1965 statement was issued without rule making does not justify dispensing with rule making for the 1970 statement.

Advance rule making was a necessary procedure here, and the failure to follow the procedures prescribed by Section 4 of the APA (5 U.S.C. § 553) renders the new policy statement unlawful.

5. THE COMMISSION HAS ABANDONED ITS REGULATORY RESPONSIBILITY UNDER THE COMMUNICATIONS ACT

If nothing else, the Communications Act contemplates that the FCC will, pertinently, *regulate* the television industry. The Policy Statement, however, constitutes an abnegation of regulatory responsibility. By casting the evaluation of renewal applicants in a unilateral frame of reference, the Commission forecloses itself from the greatest weapon it possesses to improve the industry in the public interest; i.e. *to test the performance of incumbent licensees at renewal time in the comparative context of new applicants who believe they possess superior qualifications and are willing to bear the great time, effort, and expense entailed by challenging an incumbent.*

Paradoxically, the Policy Statement issues at a time when all of the available VHF channels in markets of any consequence have been assigned to licensees (and the same is largely true of the less desirable UHF channels in principal markets). In other words, now that virtually all channels rest in the hands of licensees, the Commission would close the door, thereby securing the license in perpetuity from effective challenge at renewal time. American broadcasting thereby becomes unchanging and, in large measure, unchangeable. The Commission has foreclosed itself from a capacity to improve the face of broadcasting by comparative tests related to the actual performance of licensees.

Qualified challengers to renewal applications simply will not come forward unless they are assured of a comparative hearing wherein their qualifications are tested. The financial cost alone to a challenger in effectively prosecuting his application at all levels is on the order of one quarter million dollars. Simply stated, no challenger is going to incur this dollar expense, to say nothing of the enormity of time and effort involved, if he knows from the outset

that his superior qualifications will never be—or at best “may be”—comparatively considered. The result is that there will be no challenging applications. Indeed, upon the issuance of the Policy Statement all challenging applicants ceased and some of those pending were voluntarily dismissed in consideration of the futility involved in pursuing them. It is fair to say that the Commission well knew that this would be the inevitable result of the Policy Statement. But this is not regulation in the public interest. It boils down to calculated disregard of the public interest. The only “interest” served is that of the incumbent licensee who is relieved from vindicating his stewardship and qualifications in a comparative setting.

To be sure, the Commission has sought to justify the Policy Statement by reason of the asserted need for *stability* and *predictability* vis-a-vis licensees. Apart from the fact that such “need” is asserted in a vacuum with no record findings of fact supporting such a gratuitous conclusion, it is self-evident that the only stability and predictability involved is equated with perpetuating the interests of existing licensees. It has no proved or provable relationship to the public interest.

The unabashed concern of the FCC for the private interests of broadcasters without regard for the public interest is truly evinced by the frantic move to protect all broadcasters from a meaningful comparative hearing on their renewal applications *before it decided one single case involving a renewal applicant and a new applicant for the same television facility*. With this in mind, one may fairly inquire as to the predicate for the assertedly undesirable consequences of a full, fair and complete comparative hearing for an applicant challenging an incumbent's license-renewal application. How can the Commission possibly know that such consequences will ensue? It has never decided a single such case—to say nothing of a case wherein the new applicant prevailed. Manifestly, any sig-

nificant adverse economic or other impact upon an incumbent television operator would obtain only if he were replaced by the new applicant. But this could occur only after the Commission had found that a grant to the new applicant served *the public interest*. Most certainly the public interest is the touchstone of the Communications Act and requires precedence over any parochial financial adversity experienced by an incumbent who has lost his license in favor of one found better equipped to serve the public interest.⁷ Otherwise stated, the "concerns" assertedly justifying the Policy Statement have relevance only to a situation wherein an incumbent is displaced as a licensee *based upon a Commission finding that the public interest would be served thereby*.

The Communications Act requires that the Commission regulate in the public interest. When the Commission issues a Policy Statement that deserves the public interest, it acts unlawfully and abandons its regulatory responsibility under the Act.

The rejection by the Commission of its statutory mandate from the Congress is well illustrated by the very language the agency uses to justify its action. The intent of Congress as reflected in its statement of the purpose of the Communications Act of 1934 is clear and unambiguous:

"To provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." (Sec. 301; 47 U.S.C.A. § 301.)

⁷It should be borne in mind that the licensee will have enjoyed the economic benefits from the three-year statutory period covered by the license *plus* such benefits during a period of from three to four years during which his license undergoes the hearing and related judicial processes of a comparative hearing, *a period of six to seven years*.

Yet the Federal agency to whom the licensing function is delegated speaks in the Policy Statement of license renewal as a "reward" for past service:

"It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service." (22 F.C.C.2d at 425.)

- Moreover, the authority to continue that service is the license which terminates by law after three years (§ 307(d) of the Act). The statement "If the license is given subject to withdrawal . . ." (22 F.C.C.2d at 425) challenges the Act, and misstates the statutory scheme. The license given is to expire in three years. The denial of renewal is not withdrawal of the license, for the license has already expired. The attempt to rest the Policy Statement on the need to "induce people to enter the field and render what has become a vital public service" (22 F.C.C. 2d at 425) is almost humorous in view of the obvious purpose of the Policy Statement to deter people from entering the field. The Congressional grant to a new applicant of a full hearing on his application (§ 309(e)) is rejected by the Commission. In its place the Commission offers only a hearing on the performance of the incumbent licensee. In the words of the Commission itself, the Policy Statement "expressly states that any interested persons who believe that an existing licensee has not, in its last license term, provided substantial service, without serious deficiencies, may file a competing application and will be given a full opportunity to establish *that crucial fact* in a hearing." In Re Rulemaking Petition of BEST, 21 F.C.C.2d 355, 357 (1970). That is not the hearing to which an applicant is entitled by law. The Commission has placed upon the competing applicant the burden of showing that the renewal applicant has not substantially served the community in order to obtain a hearing on

his application. That is simply not the statutory scheme of the Communications Act of 1934.

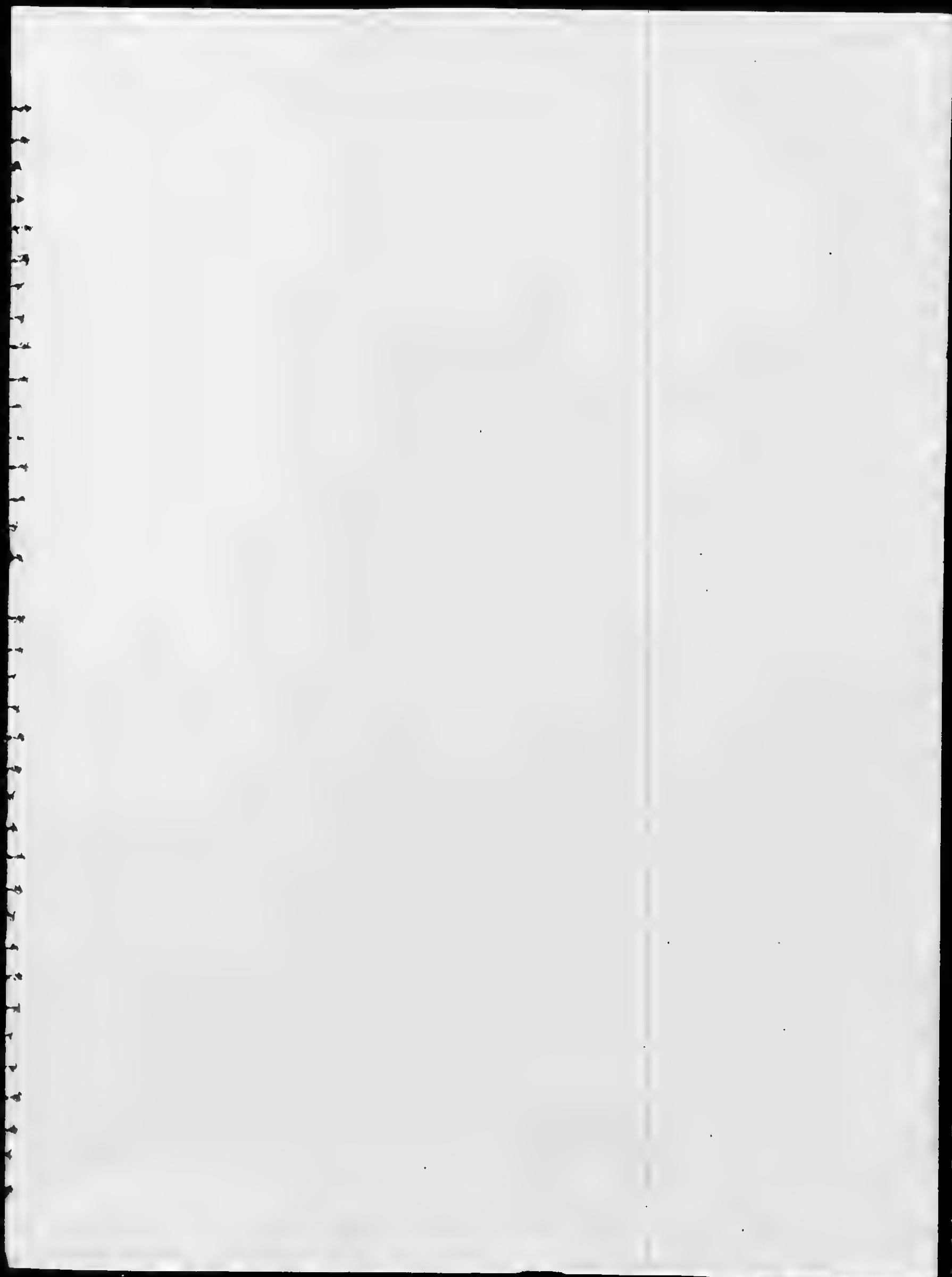
CONCLUSION

The Commission's *Policy Statement On Comparative Hearings Involving Regular Renewal Applicants* deprives petitioners of their rights under the Communications Act of 1934 and is contrary to the Administrative Procedure Act and the First Amendment. In adopting the Policy Statement, the Commission has exceeded its authority and abdicated its responsibility to regulate the broadcasting industry in the public interest. The Policy Statement should be set aside by this Court.

Respectfully submitted,

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BRIEF FOR INTERVENOR, RKO GENERAL, INC.

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24,221

CITIZENS COMMUNICATIONS CENTER, *et al.*, APPELLANTS,

v.

HONORABLE DEAN BURCH, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, *et al.*, RESPONDENTS.

No. 24,471

CITIZENS COMMUNICATIONS CENTER, BLACK EFFORTS FOR SOUL IN TELEVISION, ALBERT H. KRAMER, WILLIAM D. WRIGHT, PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS.

No. 24,491

HAMPTON ROADS TELEVISION CORPORATION and COMMUNITY BROADCASTING OF BOSTON, INC., PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS,

RKO GENERAL, INC., DUDLEY STATION CORPORATION, and WTAR RADIO-TV CORPORATION, INTERVENORS.

ON PETITIONS OR REVIEW OF FEDERAL COMMUNICATIONS COMMISSION'S POLICY STATEMENT

United States Court of Appeals
for the District of Columbia Circuit

Harold David Cohen
James J. Freeman

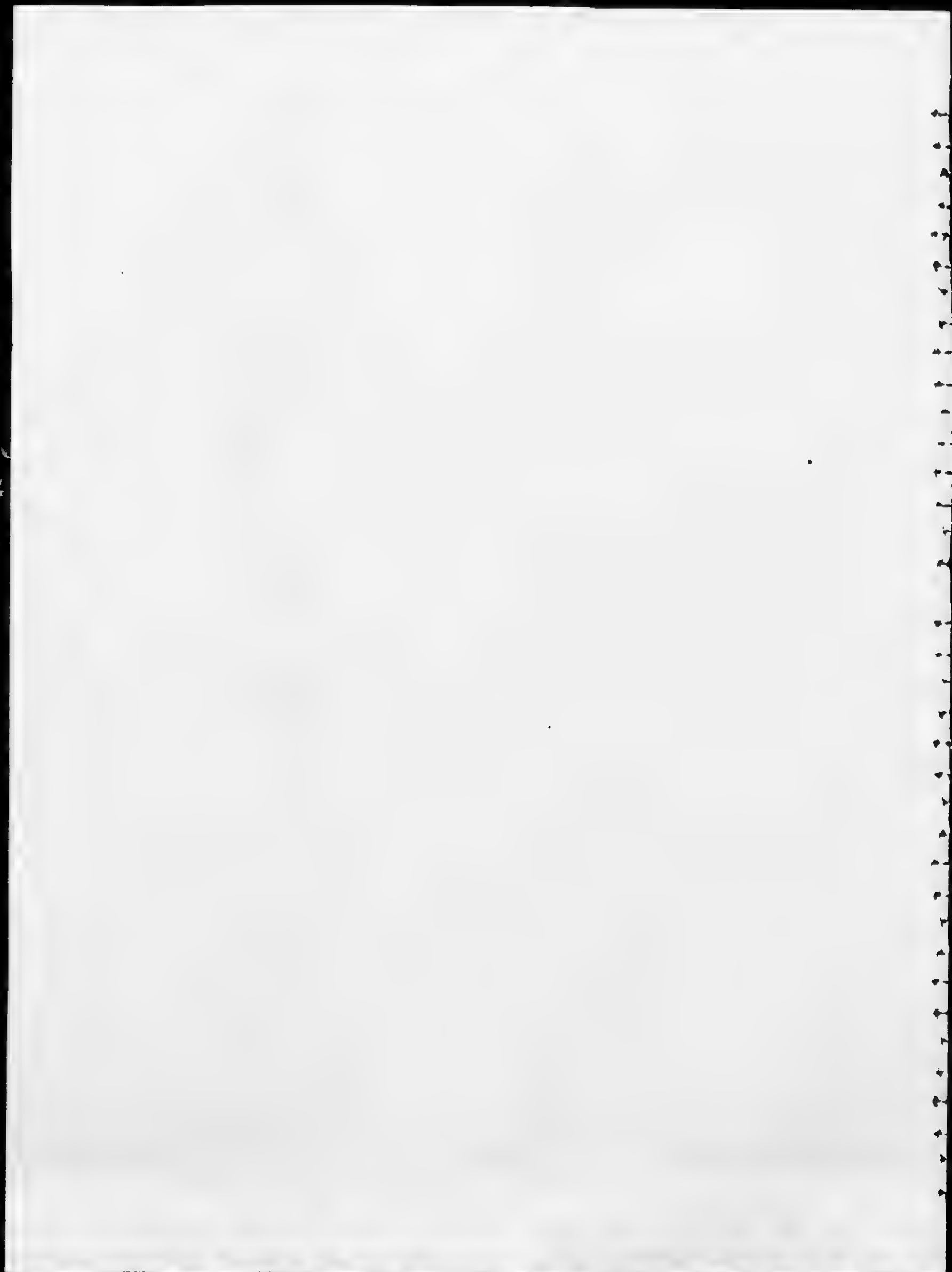
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ON PETITIONS OR REVIEW OF FEDERAL COMMUNICATIONS
COMMISSION'S POLICY STATEMENT

BRIEF FOR INTERVENOR, RKO GENERAL, INC.

STATEMENT OF THE QUESTIONS PRESENTED
AND COUNTERSTATEMENT OF THE CASE

Intervenor, RKO General, Inc. adopts the statement of questions presented and the counterstatement of the case which are contained in the brief of the Respondents.

ARGUMENT

I. THE COMMISSION'S POLICY STATEMENT ON RENEWAL APPLICATIONS IS NOT SUBJECT TO JUDICIAL REVIEW AT THIS TIME.

Intervenor RKO General, Inc. agrees with the Respondents that the *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (January 15, 1970), reconsideration denied by Memorandum Opinion and Order, 24 F.C.C.2d 383 (released July 21, 1970) are not reviewable orders and that the several petitions for review of the Policy Statement and the Order denying reconsideration should be dismissed as premature. The Commission has pointed out that while the Policy Statement expresses its views on matters of substance, and is a "unified expression of policies largely formulated in earlier adjudicatory cases," it remains subject to full reargument in individual cases. 24 F.C.C.2d at 384. The Statement was intended as a counterpart to the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, which discussed the comparative criteria in contests between new applicants. The 1970 Policy Statement's purpose was to clarify the Commission's policies as to contests between applicants for renewal of license and new applicants for the same facilities so as to assist hearing examiners in deciding such cases, expedite the hearing process, promote consistency in agency decisions, and finally, to inform the broadcast industry and the public of the applicable decisional standards. 22 F.C.C.2d 424. As the Commission expressly advised the public, "parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation." *In re Petitions of BEST, et al.*, 21 F.C.C.2d 355, 356 (1970).

*Seems like
a review*

If, nevertheless, the Court shall pass upon the merits of these appeals, Intervenor RKO General, Inc. respectfully urges the Court to uphold the Commission's action.

II. THE COMMISSION'S POLICY OF GIVING CONTROLLING WEIGHT TO A SOLID RECORD OF MERITORIOUS PERFORMANCE BY AN APPLICANT FOR RENEWAL OF LICENSE AS AGAINST A NEW APPLICANT FOR THE SAME FACILITY CONSTITUTES A VALID PUBLIC INTEREST JUDGMENT AS WELL AS ELEMENTARY FAIRNESS AND DUE PROCESS OF LAW.

The essential question sought to be litigated here is whether the Commission may validly announce in advance that as between a regular licensee who is seeking renewal of license and a newcomer who files on top of him and seeks to replace him as licensee, a record of solidly meritorious broadcast service by the incumbent during the previous license term, which is established by evidence in the adversary proceeding, generally shall be the controlling factor in favor of a renewal for another term. Intervenor RKO General, Inc. submits that the Commission's statement of policy is not only clearly within the ambit of its authority, but that any other policy would violate elementary fairness and due process. Broadcasters who have expended millions of dollars in buildings, electronic equipment, other materials and programming and who have assembled staffs who have dedicated their careers to the enterprise, should indeed be given reasonable expectations that if they operate in such a fashion as to satisfy high public interest standards and demonstrate that they have met the needs of the community they will be allowed to continue to carry on for another term.

The Policy Statement on Comparative Hearings Involving Regular Renewal Applicants recognizes that any incumbent licensee, upon expiration of the term of its license (not to exceed three years)

Licensee Policy

they have not assumed how they are to be treated from others

must undergo a hearing in the event another application for the same facility is filed. It is indisputable that there is no automatic right to renewal. In stating, however, that renewal for another term would be granted if the evidence established that the licensee's operations, unblemished by any serious deficiencies, were indeed strongly attuned to meeting the needs of its service area,¹ the Commission has recognized an important public interest in maintaining stability and predictability in the broadcasting industry. As it pointed out, "[I]n an industry requiring substantial investments, often with long periods of financial loss, the public interest is served by a reasonable assurance that good public service will constitute a protection against a complete loss of the business." 24 F.C.C.2d at 384.

The Commission sought to accommodate the public interest in stability and predictability with the public interest in retaining the competitive spur afforded by challenges to incumbents. It has accomplished this objective by the procedure which requires a regular licensee seeking renewal to prove in the crucible of an adversary hearing that it is deserving of renewal based upon a solid record of achievement. Thus, the licensee will continue to have the incentive to make the investments in facilities, personnel, etc. required for broadcasting in the public interest since he will know his future as

¹Petitioners' assertion that the 1970 Policy Statement will foreclose an expression of minority views is specious. Under the substantial service test, any significant failure to cover the needs of minority groups would affect adversely the service record of the renewal applicant. Each applicant is required before receiving its license to ascertain the needs of its service area and to identify those needs and programs it will use to meet them (FCC Form 301, Sec IV-A, Part I, Item 1). Upon renewal, applicants must show how they met their area's needs (FCC Form 303, Sec. IV-A, Part II, Item 4). The renewal applicant must also reascertain and identify its service area's needs and list its programs designed to meet them (FCC Form 303, Sec. IV-A, Part I, Items 1A, B, C.) Similarly, failure by a licensee to permit access to its facility for all viewpoints on issues of public importance would raise serious questions as to the adequacy of its service.

What?

Not sure if
lose -
only had
a 3yr license

if continues
it in the face
of competing
aplic. will
be in pub. int.
they
deserve

appropriate
factors to
consider,
but certainly
shouldn't
be continued

a broadcaster will turn on his own performance. He will have the opportunity to continue in business for another license term provided he can establish at a hearing that he has indeed operated in the public interest.^{1a} The newcomer, on the other hand, will continue to have an incentive to mount a challenge since if the incumbent should fail to establish a solid record of performance the newcomer will probably prevail. The Policy Statement expressly provides that an incumbent who has not established that his broadcasting service during the preceding license period has been of such a high caliber as to warrant a controlling preference will be at a clear disadvantage as against the new applicant:

"[I]f the competing new applicant establishes that he would substantially serve the public interest* he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest."

*"With several such new applicants the 'Policy Statement on Comparative Broadcast Hearings,' 1 FCC 2d 393, would be the basis of decision as among them." 22 F.C.C.2d at 426.

Petitioners insist that, in choosing between an applicant for renewal of license and a new applicant for the same facilities, the Commission has no authority to make past performance of high caliber a controlling factor. They urge that the Commission is restricted to the same criteria which it uses in contests in which

^{1a}In the Policy Statement the Commission excluded evidence of improved service by existing stations following the filing of competing applications. It explained that: "The renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon." 22 F.C.C.2d at 427.

only new applicants are involved and which were set forth in the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The principal decisional factors referred to in that Statement are diversification of control of media of mass communications, local ownership, and "full-time participation in station operation by owners," commonly referred to as integration of ownership and management.² Essentially, therefore, petitioners contend that the criteria of diversification, integration and local ownership must be as dispositive in contests between a renewal applicant and a new applicant as they generally are in contests between new applicants. We respectfully submit that to hamstring the Commission in the manner proposed by petitioners would be a great disservice to the public interest, as well as a shocking hardship on existing licensees.

When it adopted the 1965 Policy Statement the Commission explicitly stated that it was not attempting to "deal with the somewhat different problems raised when the applicant is contesting with a licensee seeking renewal of license." 1 F.C.C.2d at 393, n. 1. The 1970 Policy Statement adopts the commonsense approach that if a licensee has discharged its trust during the preceding license period in a manner which clearly serves the public interest, it would be a disservice to the public as well as to the licensee to discard a legitimate expectation that the license will be renewed for another term. It is patently hazardous to terminate what, by empirical data, has been established to be good service and instead take a chance on the paper proposals of a newcomer. — *At - For & That Can I have been taken into account*

*Doesn't
Expect and
you act*

*select some
who would
the pub out
better*

²Normally no comparative issue is designated on program plans and policies, or on staffing plans or other program planning elements since, as the Commission stated:

"Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation." 1 F.C.C. 2d at 395.

The Commission has not been unmindful of possible long-range advantages of greater diversification of media, more local ownership, greater integration, etc., but it has deemed it unsound, unfair and unnecessarily harsh to accomplish them by effecting forfeitures on the part of renewal applicants who have established substantial records of public service as broadcasters. Instead, restructuring of the industry with appropriate periods for divestment is considered the reasonable way to proceed. Thus, the Commission stated:

"We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. See 1 F.C.C.2d at pp. 394-95. We have stated, however, that as a general matter, *the renewal process is not an appropriate way to restructure the broadcast industry.* For example, *In re Application for Renewal of WTOP-TV*, FCC 69-1312. Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings. Here, again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rulemaking proceedings. For example, FCC dockets Nos. 18110 and 18397. *If any rulemaking proceeding, now pending or initiated in the future, results in a restructuring of the industry,*

Grandfathered

why?

it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and 'best conduces to the proper dispatch of business and the ends of justice;' section 4(j) of the Communications Act; *WJR v. FCC*, 337 U.S. 265, 282 (1948). In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged, *the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings.*" 22 F.C.C.2d at 427-28 (footnote omitted, emphasis added).

In the rule-making proceeding referred to, *Notice of Proposed Rule Making*, Docket 18110, 33 Fed. Reg. 5315 (1968), the Department of Justice submitted statistics on the concentration of ownership in mass media facilities in the fifty largest broadcast markets. The Department's comments showed that at least one—and in most instances more than one—of the broadcast stations in each of the top fifty markets in this country, is affiliated with other media interests in the same market. Cross-ownership of media within the same market as well as ownership by one entity of multiple stations in different markets, are not phenomena of recent origin. Many of these broadcast facilities date back to the pioneering days of broadcasting. Multiple and co-located ownership has been repeatedly approved by the Commission. Furthermore, most licensees in major markets, with Commission knowledge and approval, have historically used professional management to operate their stations. Investments by multiple owners in VHF television, UHF television, FM radio, or other broadcasting services were often made at stages in their development when substantial financial risks were undertaken.³

³For example, in its operation of the independent (i.e. non-network) station KHJ-TV in Los Angeles, a seven-station market, it took RKO General, Inc.

[footnote 3 continued on next page]

Patently, publicly held licensees and licensees of more than one station are intrinsically unable to point to the degree of diversification and integration which a new applicant, starting from scratch, can design as part of its proposal in order to gain what he considers to be a comparative advantage.

Not only did the multiple ownership, non-integrated structure evolve with Commission sanction⁴ but in many instances it necessarily came about in order to meet a specific public interest need. For example, in its 1954 Report and Order which allowed groups which already held licenses for five VHF television stations to acquire additional UHF television facilities, the Commission stated:

"The problem that is presented in these proceedings is whether the more rapid and effective development of the UHF band warrants permitting the ownership of additional UHF stations. We believe that it does.

about ten years after it acquired the station in 1951 to overcome the early losses and get the station into an overall profit position. RKO General, Inc., FCC 69D-43, 16 Pike & Fischer RR 2d 1181, 1190 (Int. Dec., 1969). Although broadcasting is considered generally profitable, the Commission's annual financial data indicate that in 1969 65% of the UHF television stations operated at a loss. 69% of the FM stations owned independently of local AM stations suffered losses in 1969 and 32% of the AM and AM-FM stations lost money. TV Broadcast Financial Data - 1969 (FCC News Release, July 24, 1970); AM, FM Broadcast Financial Data - 1969 (FCC News Release, December 14, 1970).

Then you should be glad to get rid of them

⁴As stated above, the existing cross-ownership, multiple ownership and corporate ownership is fully consistent with the FCC rules which permitted the present licensees to initially obtain the licenses for these stations, and which continue to permit them to retain such licenses. However, as a result of the proceedings in Docket No. 18110, the Commission has adopted rules of prospective effect which would prohibit the creation of any new cross-ownership interests in broadcast media within the same market. First Report and Order, Docket No. 18110, 35 Fed. Reg. 5948 (1970). Pending now is a proposal to similarly ban newspaper-broadcast cross-ownership and to require divestiture of stations which are now affiliated with other media in the same market. Further Notice of Proposed Rule Making, Docket No. 18110, 35 Fed. Reg. 5963 (1970).

We are aware of the serious problems which presently confront the development of the UHF. The problem is particularly acute in the larger pre-freeze markets where high VHF-only set saturation obtains. It is in these areas particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF. *We are persuaded that the entry of these multiple owners into such key markets will furnish a substantial impetus to UHF. . . .*

"The multiple ownership of broadcast stations does not play an important role in our nationwide broadcast system. The ownership of broadcast stations in major markets by the networks, for example, is an important element of network broadcasting. *Our nationwide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted.* We have always recognized these needs and have by rule permitted multiple ownership of broadcast stations in the light of such (other and competing) considerations. Here too *it is our view that the greater good which will flow from the proposed rule offsets the disadvantage resulting from permitting individual licensees to own a larger number of stations.*" Report and Order, Docket No. 10822, 19 Fed. Reg. 6099, 6012 (1954). (Emphasis added.)

The present rules permit ownership of seven television stations, no more than five of which may be VHF stations. 47 C.F.R. § 636 (a)(2) (1970). There is no restriction on the location of these stations as long as they are not within the same market. 47 C.F.R. § 636(a)(1) (1970). In declining to adopt a proposal which would have permitted a single entity to acquire no more than three stations in the top fifty market, only two of which could be VHF, the Commission said:

"Equally important, it is observed that insofar as UHF stations are concerned, an absence of the type of restriction proposed in the rule herein may well serve to make for a more rapid development of such stations and enhance the chances for development of a fourth commercial TV network. It would significantly contribute to the entry of persons who have the know-how and the financial resources to enter into and carry on UHF television broadcasting during this most crucial period. Indeed, this consideration of possible benefits to television service through entry of the multiple areas, although not as critical as in the UHF area, is also relevant to the public interest judgment to be made in this field with respect to VHF operation." *Notice of Proposed Rule Making*, Docket No. 16068, 33 Fed. Reg. 3078, 3080, (1968). (Footnotes omitted).

Where a preexisting administrative policy has achieved the force of law and been relied on as it has been here by the broadcasting industry, it would, we submit, be glaringly unjust for this Court to alter that policy with retroactive effect. Cf. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 116 (1939); Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 408-419 (1941).

"... Retroactive change in settled law may be unjust whether the change is made by administrative action, by a court decision, or by an administrative amendment designed to conform to changes brought about by judicial decisions. The common-law tradition to the contrary notwithstanding, a retroactive change of settled law by judicial decision is just as fair or unfair as a retroactive change of settled law *in similar circumstances* by administrative or legislative action. Therefore, changes in settled law, whether by judicial decision or otherwise, frequently should be limited

to prospective operation." 1 Davis, *Administrative Law Treatise*, 351-2 (1958)

As the Commission has stated, the only proper and fair way such criteria as diversification and integration can be applied to existing licensees is prospectively through rule making procedures and by orders of divestiture where it is properly deemed necessary to effectuate the public interest. The Commission has uniformly relied on prospective rules or permitted orderly divestiture in restructuring the broadcast industry in recognition of the fact that otherwise a change in its rules would be basically unfair. And this Court has recently agreed that the renewal process is an inappropriate forum, absent special circumstances, for changing policies regarding the ownership of broadcast facilities. *Hale v. FCC*, ___ U.S.App.D.C. ___, 425 F.2d 556 (1970). In that case the Court affirmed the Commission's renewal of the license of KSL-AM over the objections of complainants who alleged undue concentration of control of media in Salt Lake City, Utah. The Court held that appellants were challenging

"the wisdom of the Commission's existing multiple ownership rules, which have allowed the granting of licenses to conglomerate structures of the kind involved here. Thus it is that, in the context of this particular renewal proceeding, appellants seek a hearing to effectuate an overhaul of the Commission's general policy that multiple ownership and resulting concentration are not per se against the public interest." *Id.* at 560 (footnote omitted.)

In upholding the Commission the Court held that such structural changes "may be more effectively and properly carried on there [in rule making] than by setting this renewal application down for hearing with a view to a change in policy with respect to this particular applicant." *Id.* at 560.

The facilities of multiple, non-integrated owners were all lawfully obtained at considerable expense and substantial investments were thereafter made to improve the stations in reliance on reasonable expectancies. It would be shocking to have them forfeited to newcomers by a wooden application of diversification or integration criteria in a comparative hearing.

*With knowledge
that they were
good for 3 yrs
only*

Commissioner Hyde aptly summed up the absurdity and inherent unfairness of treating both new and renewal applicants alike:

"The filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of any locally owned applicants? Is the Commission now ready to read out established broadcasters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?"⁵

Structural modification of the industry should await the outcome of the pending rule-making proceedings. To impose forfeiture of a going business because a new applicant proposes greater local ownership, diversification or integration is, we submit, unconscionable.

*Nobody
is suggesting
forfeiture—
merely want
to give competing
applicants a chance
to establish
that they are better*

⁵Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 403 (1965) (dissenting opinion).

Proposed service

*+ adequacy of present service
also to be measured.*

*only those present licensees
who are weaker than applicant in all categories
would be required*

ble under the most rudimentary concepts of fairness and due process.⁶

III. THE WEIGHT ACCORDED A RECORD OF SOLID PERFORMANCE BY REGULAR RENEWAL APPLICANTS IS WHOLLY CONSISTENT WITH LEGISLATIVE, JUDICIAL AND ADMINISTRATIVE PRECEDENTS.

Petitioners have not cited a single case in the history of the administration of the Communications Act of 1934 and of the predecessor statute, the Radio Act of 1927, where the same comparative criteria were applied to regular renewal applicants as to new applicants. On the contrary, consistent judicial and administrative interpretations of the governing statutes have recognized that the public interest is not served by the displacement of an incumbent licensee who has served the public well. This Court has pointed out that:

"The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons. *Chicago Fed. of Labor v. Fed. Radio Comm.*, 59 App. D.C. 333, 41 F.2d 422. Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be

⁶Even in enforcing the antitrust laws, where violations are found divestiture is considered the harshest remedy. And even in those instances it is sparingly employed, especially where it would affect legitimately acquired interest. For example, in *Schine Chain Theatres v. United States*, 344 U.S. 110 (1948) the Supreme Court remanded the case to the District Court for formulation of an order distinguishing, where possible, between divestiture of lawfully obtained theatres and those acquired through monopolistic practices.

subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons." *Journal Co. v. Fed. Radio Comm.*, 60 App. D.C. 92, 94, 48 F.2d 461, 463 (1931). See also, *Evangelical Lutheran Synod v. FCC*, 70 App. D.C. 270, 272, 105 F.2d 793, 795 (1939).

Congress has been swift to nullify any procedure whereby existing licenses are held forfeited for reasons other than misconduct or failure to perform adequately in the public interest. For example, the Commission early in the administration of the Radio Act of 1927 deleted two existing Chicago stations to award the frequency to a proposed station in Gary, Indiana, in deference to the mandate of the Davis Amendment (Act of March 28, 1927, Ch. 263, §5, 45 Stat. 373) which required equality of allocations among the five geographic zones established by the Act. When the Commission action was upheld in *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), Congress repealed the Davis Amendment to avoid any such harsh result. (Act of June 5, 1936, Ch. 511, §2, 49 Stat. 1475.) See *Regulation of Broadcasting*, A Study for the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., 51-3 (1958).

In an attempt to develop some legislative history in support of their position petitioners rely heavily on certain statutory language which formerly appeared in Section 307(d) of the Communications Act of 1934, to-wit:

"The granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications"⁷

⁷ Act of Feb. 12, 1927, Ch. 169, § 9, 44 Stat. 1165-74.

as demonstrating a Congressional intent to eliminate any differentiation in the treatment of new and renewal applicants in competitive hearings. The legislative history does not support that position. This language served only to negate any contention that the granting of a license confers any vested right in the licensee with respect to the license.⁸ It did not purport to restrict the Commission in delineating public interest criteria, or in assigning relative weights to the criteria governing renewal applications involved in hearings.

The White-Wolverton bill (S. 1333, 80th Cong., 1st Sess.) passed by the Senate in 1947, which proposed deletion of the foregoing language in 307(d) in order to simplify renewals by reducing the burden of including data in renewal applications which were already available in the Commission's files, did not suggest that this language had ever been intended to apply the same criteria to competitive hearings involving renewal applicants as to original applicants. Rather this history merely reconfirmed the Commission's right and duty to evaluate the renewal applicant's performance against the broad standard of public interest, convenience and necessity.⁹

The hearings on the 1952 or "McFarland" amendments (Act of July 16, 1952, Pub. L. No. 82-554, 66 Stat. 711) to the Communications Act, which followed the White-Wolverton bill in modifying the quoted language in Section 307(d), showed that the change was designed not only to eliminate the necessity of furnishing redundant data but also to allay concern expressed by the broadcast industry that the earlier language might possibly be construed—as petitioners now contend—to permit the use of the same criteria for renewal applicants as for new applicants. Typical of the apprehension expressed was the following:

⁸Hearings on H. R. 7716 Before the Senate Committee on Interstate Commerce, 72d Cong., 1st Sess. at 13 (1932).

⁹S. Rep. No. 1567, 80th Cong., 2d Sess., at 8, 9 (1948).

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But that's
what it
is
said.

"For many years, broadcasters have assumed that licenses would be renewed if the licensee fulfilled the requirements laid down by the Commission. Only recently, however, a licensee has been put to the burden and expense of a competitive hearing on renewal, and the case is not yet finally decided.

"We believe that a licensee who builds and develops a station is entitled to an expectancy of renewal if he lives up to the rules and regulations of the Commission. The business of broadcasting—and this is even more true in television than in radio—requires the expenditure of large sums of money and large amounts of energy in the development of a station. The initial period of operation is seldom profitable, and unless there is a strong expectation that licenses will be renewed, the long-term investments of money and energy which are now required cannot be justified.

"If the considerations on renewal are to be the same as those which govern the granting of an original application in a competitive hearing, the Commission might be justified, in my opinion, in deciding in favor of the newcomer with his more grandiose promises as against the present licensee with a more modest record of performance."¹⁰

The amendment of 307(d) rebutted any inference that the previous language had been intended to preclude recognition of equities in the renewal applicant. The views of Senator McFarland were exemplified by his observation that:

¹⁰Testimony of Joseph H. Ream of Columbia Broadcasting System. *Hearings on S. 658 Before the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 1st Sess., 304 (1951). See also, Testimony of Justin Miller, President, National Association of Radio Broadcasters. *House Hearings, supra.*, at 353. Cf. Statement of Don Petty, *Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess., 91 (1949).

*Inducted
Testimony*

" . . . This man that has the present license has a big investment there, and probably if he is in this television business costing him half a million or more, his position ought not to be jeopardized by an application based on a paper promise. If we do that, very few people are going to gamble on going into this business. Nobody is proposing to strip the Commission's power to revoke that license for cause, or even to refuse to renew it for cause, they continue to have that power.

"But, nevertheless, the man has an investment there and in order to encourage people to go into that business I think you have to place greater burden upon the new man to come in and take that station away from him."¹¹

1949 —
Blazing TV
Development

Before the enactment in 1952 of the revisions of the Communications Act, including the substitution of new language in section 307(d), the Commission decided the pending case referred to above which had given rise to much of the concern expressed by broadcasters. On June 14, 1951, the Commission held that the Hearst Corporation, which owned radio station WBAL and a newspaper in Baltimore as well as a permit to construct a television station in that city, and which owned newspapers and broadcast stations in other parts of the country, would be granted renewal of its license for WBAL in preference to the new application for the same facility which had been filed by a newly-formed local group, with much superior integration and with no other media interests. In the Commission's judgment the decisive factor was the incumbent's operating record which was demonstrated in the hearing to be "meritorious." *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1175 (1951). The Commission, advertng to the then existing language of 307(d), stated:

"We are not unmindful of the provisions of Section 307(d) of the Communications Act of 1934, as

¹¹ 1949 Senate Hearings, *supra*, at 128.

amended, to the effect that 'action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.' Although this section might be given such a literal construction as to eliminate from consideration the record of an existing licensee seeking renewal when in a comparative hearing with a new applicant, we do not believe that such a limited interpretation would be consonant with the overriding requirements of the Communications Act that the public interest be the controlling consideration in the Commission's determination." *Id.*

In *Hearst*, the Commission considered the weight which should be given the various comparative criteria in a hearing between a renewal applicant and new applicant. As to the integration factor, the Commission stated:

"We have, in previous decisions, particularly among unproved applicants, given one applicant preference over another on the basis of a greater integration of management and ownership. The basic reason for comparing the degree of such integration is the presumption of great probability that proposed policies will be carried out by an applicant whose beneficial owners will not participate actively in the management of a station. *This presumption will not be invoked where a record is available establishing the capabilities of the management employed by prospective licensees to carry out the proposed policies.*" *Id.* at 1179. (Emphasis added.)

In *Hearst* the Commission also found the new applicants superior showing as to local ownership insignificant. The Commission stated:

"Although where both applicants are unproved, the presumption that local ownership has a greater familiarity with the needs and interests of the listeners of the area to be served may cause us to favor an applicant with a higher degree of local ownership, local ownership alone is of less import where an existing station has demonstrated its ability to operate in the public interest and to provide for the needs of the communities within its service area. Over the years of operation, the WBAL management representing the ownership has acquired considerable experience regarding the requirements of the area to be served and the record indicates that the operations personnel have become closely associated with civic, philanthropic, governmental and educational circles in the community and that they have in the main recognized and provided for the needs of the community. An examination of the record shows a desirable cooperation by WBAL with local institutions, particularly since 1946, and we therefore do not find under the circumstances that the factor of local ownership should be a controlling element in our decision." 15 F.C.C. at 1180.

The Commission in *Hearst* also set forth its views on the diversification standard where renewal applicants are involved:

"We believe that normally diversification is not a controlling element where a person has been licensed by the Commission for more than one station and operates these stations in the public interest; where the licenses held are not in violation of our rules; and where the record does not clearly establish from facts pertinent to the individual case, that the control of other radio facilities would make a renewal of the license not in the public interest." *Id.* at 1181.

In giving controlling weight to Hearst's past record which demonstrated "its ability to render a well-rounded program presenta-

tion covering substantially the major needs of its service area" (15 F.C.C. at 1178), the Commission concluded:

"We have found that both of the applicants are legally, technically, and financially qualified and must therefore choose between them as their applications are mutually exclusive. We have discussed at some length why the criteria which we may sometimes consider as determining factors when one of the applicants is not operating the facilities sought and where the applicants have not proved their abilities, are not controlling factors in the light of the record of operation of WBAL. *The determining factor in our decision is the clear advantage of continuing the established and excellent service now furnished by WBAL and which we find to be in the public interest, when compared to the risks attendant on the execution of the proposed programming of Public Service Radio Corporation, excellent though the proposal may be.*" *Id.* at 1183 (emphasis added).

Not nearly
substantial

The *Hearst* case thus held that a "controlling preference" should be accorded past meritorious service. It is extremely unlikely that Congress would have permitted the rationale of the *Hearst* decision to remain in effect for nineteen years as the guiding principle for deciding between renewal applicants and challengers if that principle conflicted with Congressional concepts of public interest. Indeed, the action of Congress in modifying Section 307(d) in the 1952 Amendments of the Communications Act reinforced the Commission's thesis that a renewal applicant with a record of strong performance in the public interest should reasonably expect to be renewed as against the paper proposals of a newcomer who sought to take over the facility.¹²

¹²It should be noted, also, that Congress at the same time took another step to assure stability in the broadcast industry. Previously, in 1945, the Commission had adopted the so-called AVCO procedure for passing on the transfer

[footnote 12 continued on next page]

The long-standing principle of *Hearst*¹³ and the acquiescence of Congress therein, reinforced by the amendment of 307(d) seemingly put to rest any fear of the broadcasting industry that comparative criteria which were applicable to hearings involving new applicants would be applied to incumbents seeking renewals of licenses.

In early 1969, however, the Commission's decision in *WHDH, Inc.*, 16 F.C.C. 2d 1 (1969) created fresh concern. In that case it denied a renewal of the license to operate on Channel 5 in Boston and granted the application of a newcomer seeking the same facility. In reliance on *Hearst*, the Hearing Examiner had based his decision in favor of renewal on WHDH's operating record. The reversing opinion seemed to indicate that henceforth all renewal applicants would be governed by the standards expressed in the 1965 Policy Statement.¹⁴ On rehearing, however, 17 F.C.C. 2d 856 (1969), the Commission was careful to distinguish its treatment of WHDH from that which would be applied to regular renewal applicants, noting that WHDH "differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of

or assignment of broadcast facilities whereby a comparative hearing would be required between the proposed transferee and any other party willing to meet the purchase terms. (Significantly the AVCO procedure provided for full reimbursement of the transferor even if a new applicant was chosen over the proposed transferee—obviously far more conscionable than suggested procedures in the instant appeals which might result in massive forfeitures.) The Commission itself subsequently abandoned the AVCO procedure. Congress, nevertheless, amended Section 310(b) of the Act to make certain that there would not be any comparison between the proposed transferee and anyone else seeking the license. S. Rep. No. 44, 81st Cong., 2d Sess. at 8 (1951).

¹³See also, *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963).

¹⁴This opinion by Commissioner Bartley was joined in only by one other Commissioner. Commissioner Johnson concurred in the decision to form a majority. One Commissioner dissented, one abstained, one did not participate and one was absent.

license, whose authority to operate has run one or more regular license periods of three years Those unique events and procedures, we believe place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." *Id.* at 872-73.

As a result of the uncertainties generated by the *WHDH* decision, legislation on the subject of renewals was introduced in the 91st Congress, 1st Session. S. 2004 (the "Pastore Bill") provided that:

"Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal of a broadcast license filed under Section 308, may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds upon the record and representations of the licensee that the public interest, convenience, and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it shall deny such application, and applications for construction permits by other parties may then be accepted pursuant to Section 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied."

At the hearings on this bill,¹⁵ the unfairness and unworkability of a procedure requiring incumbent licensees to compete comparatively against tailor-made new applicants was pointed out. The continuing need of the broadcast industry for stability to insure investment was stressed. There was testimony, for example, that it would be

¹⁵ See *Hearings on S. 2004 Before the Communications Subcom. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., at 7-8 (1969).

why
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now (970)
much
different than
1979

unfeasible for licensees to make the substantial investment in equipment, buildings, and programming required to operate properly if the stations were up for grabs every three years. Witnesses also pointed out the impossibility of developing a professional staff under such conditions:

"If licenses are auctioned off every 3 years, the most serious problem of the broadcaster would be in the most important area of all; namely, people. In order to run a stable business operation and thereby render optimum service to the public, a broadcaster needs people with talent, training, experience, and dedication. There are more good opportunities than there are talented people, both in broadcasting and in the allied arts.

"If a year before a license expires, we face the threat of a competitive application and comparative hearing. our best people will be sorely tempted and in fact sometimes well advised to seek other employment, in or out of broadcasting. Without the Pastore bill, I foresee chaos in broadcasting personnel relations."¹⁶

One broadcaster told of his firm's multi-million dollar investment in UHF television, which is still unprofitable, and the effect of treating a renewal applicant as a new applicant every 3 years:

"Companies such as ours simply could not and cannot continue to pour resources and energy into broadcasting on any such basis."¹⁷

Although the Commission opposed the Pastore bill, it offered suggestions of procedures to reassure broadcasters that they would not be at the mercy of newcomers who challenged them at renewal

¹⁶Statement of Frank P. Fogarty, *id.* at 21. See also Statement of Professor Kenneth Harwood, *id.* at 103.

¹⁷Statement of Richard C. Block, Kaiser Broadcasting Co., *id.* at 102.

time with new applications tailored to meet the standard comparative criteria. Even Commissioner Bartley, the author of the *WHDH* opinion, testified:

"We believe that the basic objectives of the bill can be achieved better by administrative decision which will give due weight to good records of operation without removing the incentive for such operation now contained in the act. Such administrative action would, I believe, provide an appropriate resolution of the two main policy issues raised by S. 2004. No licensee doing a good job would have to fear loss of his license to a competitor; at the same time, the public's interest in good service should be preserved through retention of the opportunity for replacement of licensees doing a minimal public service by those better equipped for the task."¹⁸

Thereupon, on January 15, 1970, the Commission issued the Policy Statement to clarify the Commission's policy in this area. The Commission stressed that its policy of making a strongly meritorious broadcast record by an incumbent the controlling consideration in deciding whether or not to renew a license was essentially the same practice it had consistently used since the *Hearst* decision in 1951. It distinguished the *WHDH* decision as follows:

"The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the *WBAL* policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the 'Policy Statement on Com-

¹⁸Statement of Commissioner Robert T. Bartley, *id.* at 378.

parative Broadcast Hearings,' 1 F.C.C.2d 393 (1965)."
22 F.C.C.2d at 430.

In *Greater Boston Television Corp. v. FCC*, D.C. Cir. Nos. 17, 785 et al., November 13, 1970, 20 Pike & Fischer RR 2d 2052, this Court upheld the Commission's decision in *WHDH* because of the special circumstances of the incumbent's history. The Court found it unnecessary in that case to resolve the question whether the 1965 Policy Statement could be applied to regular renewal applicants because it upheld the Commission's position that the licensee of station *WHDH* was not in fact a regular renewal applicant. The opinion of the Court noted, however, that if the Commission were to apply the comparative criteria in the 1965 Policy Statement to regular renewal proceedings "there would be a question whether the Commission had unlawfully interfered with legitimate renewal expectations implicit in the structure of the act." Slip op. at 24, 20 Pike & Fischer RR 2d at 2068. Since, as the Court recognized, the 1970 Policy Statement in essence carried over the general principles on renewals expressed in *Hearst*, it would be extremely harsh to deprive existing licensees of the investments which they made in reliance on those principles.

IV. PETITIONERS' CONTENTIONS THAT THE 1970 POLICY STATEMENT DEPRIVES THEM OF A STATUTORY HEARING ARE WITHOUT MERIT.

The argument that a controlling preference to a renewal applicant for substantial services denies new applicants the "full hearing" required by Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), is untenable. *Ashbacker Radio Corp. v. FCC*, 326 U. S. 327 (1945), upon which petitioners rely, dealt with the hearing rights of mutually exclusive applicants for new facilities. It was not concerned with the weight which the Commission may properly accord various substantive public interest factors involving regular renewal applicants.

The challenge to the 1970 Policy Statement reflects an unsound assumption that the very same public interest considerations which are material in choosing between new applicants apply with equal weight to cases where a new applicant seeks to displace a renewal applicant. The Act does not attempt to delineate the various factors which are material under the broad public interest standard, but leaves it to the reasonable exercise of the Commission's administrative discretion in the light of the particular factual situation which is involved. In this instance the Commission has reasonably taken account of pertinent factors which differentiate renewal proceedings from comparative proceedings in which only new applicants are competing. Thus, it has stated that:

Not that they deserve consideration

"The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. *It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service.* Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. *The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.*" 22 F.C.C.2d at 425 (emphasis added).

Petitioners overlook the fact that in renewal proceedings the Commission cannot ignore the critically significant public interest considerations of stability and predictability—which factors are not present in initial licensing cases.

While the 1970 Policy Statement contemplates that the renewal applicant and the competing applicant will go through a Section 309 hearing at which the challenger will be a full participant, there is no sound reason why the first phase of the hearing should not be concerned with the incumbent's service, not the challenger's application. And if the hearing establishes the existence of a substantive public interest factor which is controlling, making comparative differences inconsequential, the taking of evidence on the inconsequential comparative differences would clearly be a futile, time-consuming exercise. It is not required by *Ashbacker* or by any statutory requirement of which we are aware.¹⁹

The Commission's procedures should comport with the efficient dispatch of the Commission's business. What useful purpose would be served in prolonging the proceedings to take evidence on immaterial matters? If the question as to whether the past record

¹⁹Section 309 has not been construed to require a full hearing on every application filed with the Commission. No hearing need be held, for example, where an application fails to measure up to the Commission's rules and does not indicate adequate grounds for waiver. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The Court held that the Commission's multiple ownership rule was "reconcilable with the Communications Act as a whole" and that a hearing need not be held where an application on its face would violate this rule. "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." *Id.* at 205. Similarly, comparative consideration need not be given where mutually exclusive applications are involved and one is in violation of a rule. *Guinan v. FCC*, 111 U.S. App.D.C. 371, 297 F.2d 782 (1961). Nor is comparison required where one of several mutually exclusive applicants is basically unqualified. *Simmons v. FCC*, 79 U.S.App.D.C. 264, 145 F.2d 578 (1944).

of the renewal applicant is of such high stature as to warrant renewal is "in any way close or in doubt," the Commission has advised the hearing examiner to take evidence on comparative differences among the contestants. If, however, it is crystal clear that the incumbent does indeed have a record so meritorious as to be dispositive of his application for renewal, there is no sound reason why the hearing should be prolonged to explore extraneous matters.

It is apparent that the real objection by petitioners is not to the procedure in the 1970 Statement but to the substantive policy which gives controlling weight to a record of achievement as against mere presumptions of future good performance arising from greater integration, diversification or paper promises. If, as we believe, the policy is valid, the procedure whereby the clutter of insignificant evidence is avoided is an exercise of sound administration on the part of the Commission. It is well within its powers to conduct its proceedings efficiently and with dispatch.

The use of threshold public interest findings which may be dispositive in an administrative hearing is not novel. In *FCC v. Allentown Broadcasting Corporation*, 349 U.S. 358 (1955), the Supreme Court held that the Commission in choosing between applications for stations in different communities—which stations would be mutually exclusive because of technical interference—must first determine which community has the greater need for additional services. If only one of several competing applicants should propose to serve that community, that consideration would be dispositive and would dictate a grant of his application without any consideration of their comparative qualifications. Analogously, under the 1970 Policy Statement, the filing of new applications on top of a renewal applicant triggers a threshold public interest inquiry—to wit, is the incumbent's record one of substantial performance. If the Commission arrives at an affirmative conclusion in favor of the

incumbent on that point, no useful purpose is served in taking evidence of comparative qualifications which, by hypothesis, are immaterial.

CONCLUSION

The long-standing policy of the Commission where regular renewal applicants are faced with competing applications for the same facilities is not only reasonable, sound and fair but is fully in accord with the history and traditions of broadcasting in this country which have received full Congressional approval. If the Court does not dismiss the petitions as premature, it should sustain the validity of the 1970 Policy Statement.

Respectfully submitted,

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January 7, 1971.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 16 1971

No. 24,221

Nathan J. Handberg

Citizens Communications Center, et al., APPELLANTS,

v.

Honorable Dean Burch, Chairman, Federal
Communications Commission, et al., RESPONDENTS.

No. 24,471

Citizens Communications Center, Black Efforts for Soul
in Television, Albert H. Kramer, William D. Wright, PETITIONERS,

v.

Federal Communications Commission and United States
of America, RESPONDENTS.

No. 24,491

Hampton Roads Television Corporation and
Community Broadcasting of Boston, Inc., PETITIONERS,

v.

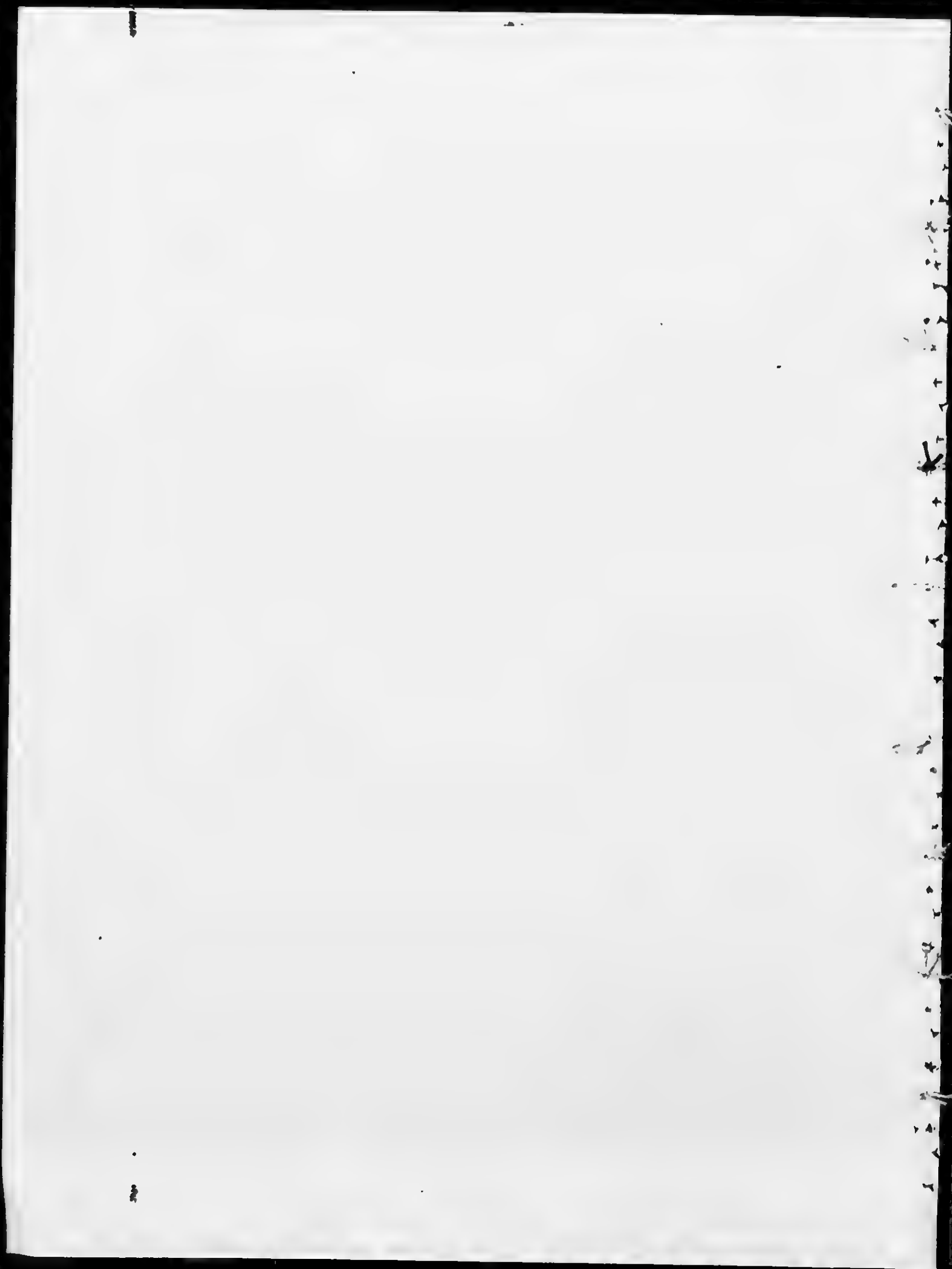
Federal Communications Commission and United States
of America, RESPONDENTS,
RKO General, Inc. (RKO), Dudley Station Corporation,
and WTAR Radio-TV Corporation, INTERVENORS.

On Petition for Review of Order of
Federal Communications Commission

REPLY BRIEF FOR PETITIONERS
HAMPTON ROADS TELEVISION CORPORATION AND
COMMUNITY BROADCASTING OF BOSTON, INC.

Welch & Morgan
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Attorneys for Petitioners

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Petitioners Hampton Roads Television Corporation (Hampton Roads) and Community Broadcasting of Boston, Inc. (Community) hereby submit this brief in reply to the brief of respondents Federal Communications Commission and United States of America (referred to hereinafter as the Commission) and the briefs of intervenors RKO General, Inc. (RKO) and WTAR Radio-TV Corporation (WTAR). The order of issues to be discussed will be the same as that followed by the respondents and intervenors, i. e., first the questions of finality and reviewability shall be considered, and then the substantive arguments on the lawfulness of the Policy Statement which have been advanced by the opposing parties will be briefly referred to.

THE POLICY STATEMENT IS
FINAL AND REVIEWABLE

The contention of the Commission and WTAR that the Policy Statement is not final or reviewable is mistaken. Although finality and ripeness are related questions we shall discuss each separately to demonstrate that the Policy Statement is both final and ripe for review by this Court.

The Policy Statement is final in the simplest meaning of that term, for no further proceedings concerning the Policy Statement are contemplated or provided for by the Commission's Rules. On its face, the Commission's order denying reconsideration of the Policy Statement is a final order within the meaning of 28 U. S. C. §2342(1) and 47 U. S. C.

§402(a), for it is the last order in the proceeding which the Commission began with the issuance of the Policy Statement. There is no cause here to explore at great length the law as to when an interlocutory ruling is final for purposes of judicial review, for the order denying reconsideration of the Policy Statement is not an interlocutory ruling. As will be shown below, however, even if the Policy Statement were deemed interlocutory, it is also final in the sense of being ripe for review under established principles of law and prior decisions of this Court.

Petitioners have proceeded in accordance with Section 405 of the Communications Act of 1934, 47 U.S.C. §405, which in substance is repeated in Section 1.106(m) of the Commission's Rules and Regulations (Pike and Fischer Radio Regulation, Current Service, two star volume, §51:106(m), at page 51:139). 47 U.S.C. §405 provides in relevant part:

"After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing. . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

There is a change in terminology from "rehearing" to "reconsideration" in Section 1.106 of the Rules, but the substance of §405 is followed. Section 1.106(m) of the Rules states:

"The filing of a petition for reconsideration is not a condition precedent to judicial review of any action taken by the Commission or by the designated authority, except where the person seeking such review was not a party to the proceeding

resulting in the action, or relies on questions of fact or law upon which the Commission or designated authority has been afforded no opportunity to pass (See §1.115(c).) Persons in those categories who meet the requirements of this section may qualify to seek judicial review by filing a petition for reconsideration."

It cannot reasonably be denied that the adopting and issuing of the Policy Statement was an "action" taken by the Commission within the meaning of §405 of the Act and §1.106 of the Rules. Since the adoption of the Policy Statement was initiated by the Commission, there were no outside parties to the proceeding. However, as competing applicants to whom the Policy Statement was made applicable, the petitioners are persons "aggrieved or whose interests are adversely affected thereby."

Petitioners sought reconsideration by the Commission, but their petition was denied. The order denying reconsideration was the last order in the proceeding begun by the adoption of the Policy Statement. As such it is a final order reviewable on the face of 28 U.S.C. §2342(1) and 47 U.S.C. §402(a). Thus, the Court's jurisdiction to review the Policy Statement is simply the Court's long established jurisdiction to review final orders of the Commission.

The opposing parties attempt to obscure the statutory basis for the Court's review here by referring to the case law governing review of orders which are technically interlocutory. It is of course true, as the Court said in Bethesda-Chevy Chase Broadcasters, Inc. v. F.C.C., 128 U.S. App. D.C. 85, 385 F.2d 967, 968 (1967), with respect to its limited jurisdiction to review only final orders of the FCC, that "Final orders are not limited to the last order issued in a proceeding." But

that does not mean that the last order issued in a proceeding can somehow become non-final for purposes of this Court's jurisdiction to review. Neither does it mean that the standards used to determine when a technically interlocutory order is final for purposes of judicial review can be used to render the last order in a proceeding less than final and reviewable.

28 U.S.C. §2342(1) and 47 U.S.C. §402(a), when read with §405, clearly contemplate judicial review of "an order, decision, report or action [which] has been made or taken in any proceeding by the Commission" (§405) after any necessary rehearing has been sought and it has become final. Since rehearing of the Policy Statement has been denied, and the Statement is now final, it would appear that the only way it could be found the Court does not have jurisdiction to review the Policy Statement would be by construing it to be not an "order, decision, report or action," or not "made or taken in a proceeding by the Commission." But the adoption of the Policy Statement, if nothing else, was at least an action by the Commission, and the adoption and issuance of the Policy Statement and denial of reconsideration would certainly seem to constitute a proceeding by the Commission. While not an adjudicatory proceeding or formal rule-making proceeding it was certainly a proceeding of some kind.

Moreover, the question before the Court is not whether there is any way the Court can avoid jurisdiction to review the Policy Statement, but whether there is any fair reading of the statute which will permit review. The Supreme Court had occasion to consider this question in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), where it stated:

*The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. . . . [Citations omitted.] Early cases in which this type of judicial review was entertained, . . . [citations omitted] have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701(a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions [footnote omitted] and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. [Citations omitted.] Again in *Rusk v. Cort*, supra, 369 U.S. at 379-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, *Judicial Control of Administrative Action* 336-359 (1965). " [387 U.S. at 139-141]

The footnote omitted from the above passage quotes H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195 as follows:

"To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." [387 U.S. at 140]

In the case of the Communications Act, Sections 402(a) and 405 certainly appear to contemplate judicial review of any final agency action

by any person aggrieved or whose interests are adversely affected thereby. There would appear to be no basis in the statute for concluding that review of any final action by the Commission is precluded. That being the case, under Abbott Laboratories v. Gardner, supra, the Court should find that 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) provide a statutory basis for direct review of the Policy Statement as a final action of the Commission.

REVIEW OF THE DENIAL
OF AN ASHBACKER HEARING

As the foregoing section indicates, petitioners submit that the Policy Statement is final in the sense that the order denying reconsideration is the last order issued in a proceeding before the Commission. However, even if the Policy Statement is deemed to be interlocutory, it is still final for purposes of review under established law. It is true, as the opposing parties contend, that to be final for purposes of judicial review an interlocutory order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948); Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51, cert. denied, sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990 (1954); Bethesda-Chevy Chase Broadcasters, Inc. v. F.C.C., 128 U.S. App. D.C. 85, 385 F.2d 967, 968 (1967).

However, this general principle of law does not apply to this case so as to prevent review, as the Commission and WTAR suggest. Petitioners contend that the Policy Statement deprives them of their

statutory right to a full comparative hearing under the doctrine of Ashbacker Radiop Corp. v. F.C.C., 326 U.S. 327 (1945). This is a denial of a right which entitles a party to review of an interlocutory order under Chicago & Southern Air Lines, supra.

It has repeatedly been held by this Court that where a party is denied his right to an Ashbacker hearing such a ruling, even though interlocutory, is final for purposes of review. Delta Air Lines, Inc. v. Civil Aeronautics Board, 97 U.S. App. D.C. 46, 228 F.2d 17 (1955); National Air Lines, Inc. v. Civil Aeronautics Board, 129 U.S. App. D.C. 180, 392 F.2d 504, 506 (1968); Midwestern Gas Trans. Co. v. Federal Power Comm., 103 U.S. App. D.C. 360, 258 F.2d 660 (1958), vacated on other grounds, 358 U.S. 280 (1959); Cf. Pan American-Grace Airways, Inc. v. C.A.B., 119 U.S. App. D.C. 326, 342 F.2d 905 (1965) cert. denied 380 U.S. 934 (1965); Seaboard & Western Airlines v. C.A.B., 86 U.S. App. D.C. 9, 181 F.2d 777, 779 (1949).

In Delta Air Lines, Inc. v. Civil Aeronautics Board, 97 U.S. App. D.C. 46, 228 F.2d 17, 20 (1955), after quoting the above language from Chicago & Southern Air Lines, supra, the Court said:

"There is no doctrine that all administrative orders which are interlocutory in form and sequence are not reviewable. So in the case at bar the Board's motion to dismiss posed the question whether the denial of a comparative hearing under the circumstances denied any right of Delta." [228 F.2d at 20]

The motion to dismiss was denied and review was granted.

In Midwestern Gas Trans. Co. v. Federal Power Comm., supra, the holding of the Delta Air Lines case was concisely stated by the Court:

"And when the Commission adopts a procedure which precludes a true comparative hearing of conflicting applications, review may be sought here without awaiting a grant of one of the applications. Delta Air Lines, Inc. v. Civil Aeronautics Board, 1955, 97 U.S. App. D. C. 46, 228 F.2d 17." [258 F.2d at 666]

In Pan American-Grace Airways, Inc., v. C.A.B., 119 U.S. App. D. C. 326, 342 F.2d 905 (1964) certiorari denied 380 U.S. 934 (1965), an airline claimed a right to an Ashbacker hearing with a mutually exclusive application filed by a foreign airline. It was held the matter was not reviewable by the Court because of the President's exclusive review over matters relating to the issuance of permits to foreign air carriers. However, the right to immediate review where a full Ashbacker hearing is denied in a conventional case was expressly recognized by the Court. After quoting the language set forth above from Chicago & Southern Air Lines the Court stated:

"Petitioners contend that the order denying consolidation does deny them the substantial right to an Ashbacker hearing with Lufthansa. In the conventional case deprivation of such a hearing to a party entitled thereto would have such aspects of finality as to be reviewable." [342 F.2d at 908]

And in National Airlines Inc. v. Civil Aeronautics Board, 129 U.S. App. D. C. 180, 392 F.2d 504, 506 (1968), the Court said:

"The major object of our inquiry is whether the Board has effectively denied petitioners' pending applications the comparative treatment to which they are entitled."
[Emphasis added.]

It should also be noted that in the very case principally relied upon by the opposing parties for their contention that the Policy Statement is not final and reviewable, Bethesda-Chevy Chase Broadcasters, Inc. v. F.C.C., 128 U.S. App. D. C. 85, 385 F.2d 967 (1967), the Court made

implicit reference to the finality and reviewability of a denial of Ashbacker rights. After quoting Chicago & Southern Air Lines, supra, and citing several cases supporting the denial of review, the final citation is "Compare Delta Air Lines, Inc. v. Civil Aeronautics Board, 97 U.S. App. D. C. 46, 228 F.2d 17 (1955)." Thus, in Bethesda-Chevy Chase itself the Court distinguished that case from the Delta Air Lines case, and this case, where the right to an Ashbacker hearing is at issue. The Commission action before the Court in Bethesda-Chevy Chase, as the Court noted, was an invitation to an applicant to amend its renewal application for hearing to correct an innocent mistake on the part of the Commission in passing on another application to change power. This action in no way restricted the competing applicant's Ashbacker right to a full comparative hearing on the merits of his own application, as the Policy Statement does. Thus the denial of review in Bethesda-Chevy Chase and the grant of review in this case are both in keeping with the prior decisions of this Court as evidenced by Delta Air Lines, Inc. v. Civil Aeronautics Board, 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955).

Accordingly, the Court has jurisdiction to review the Policy Statement whether it is treated as procedurally final or interlocutory, although petitioners believe there is no basis for treating it as other than a procedurally final action by the Commission.

The Policy Statement Is Ripe For Review

The question of ripeness comes down to the question whether the Court should review the Policy Statement now or await a case in which a competing application has been denied on the basis of the Policy Statement. In view of all the factors and circumstances involved in this case, there can be little doubt that the Policy Statement is ripe for review now.

Initially it should be observed that ripeness for review is necessarily part of the test of the finality of an interlocutory order for purposes of review, whether expressly so stated or not. That is, if the dispute raised on an interlocutory order is not ripe for review, the order is simply held not to be final, and the question is deferred for review on the final decision in the case. Conversely, if an interlocutory order is held to be final for purposes of review, that holding is tacit recognition that the dispute raised by the order is ripe for judicial review at that time. Thus the line of decisions cited previously, holding that an interlocutory order denying a party the full comparative hearing to which he is entitled under Ashbacker is final for purposes of review, also constitutes strong authority for the proposition that a denial of rights under Ashbacker is ripe for review without awaiting the completion of the hearing. See Delta Air Lines, Inc. v. Civil Aeronautics Board, supra, et al.

Another reason why this proceeding is ripe for review is that petitioners contend that the Commission has engaged in rulemaking without advance notice and without affording interested parties an opportunity

to participate. See 5 U. S. C. § 553. Claims of unlawful rulemaking have been heard by this Court, and others, in various circumstances without requiring the complaining party to show that he has already suffered tangible injury as a result of the administrative action. The fact that the petitioner would have a statutory right to participate if the agency were engaged in rulemaking is sufficient for judicial review to determine whether the agency has in fact engaged in unlawful rulemaking. See, e. g., Meredith Broadcasting Co. v. F. C. C., 124 U. S. App. D. C. 379, 365 F. 2d 912 (1966); Public Utilities Com'n of State of Cal. v. United States, 356 F. 2d 236, 238 (9 Cir., 1966). In the Public Utilities Com'n case, the California agency contended that a series of informal meetings held by the F. C. C. with the Bell System telephone companies, followed by a Public Notice, constituted unlawful rulemaking by the Commission (356 F. 2d at 238). The P. U. C. sought rehearing but its petition was dismissed. The Ninth Circuit stated that it had jurisdiction to review the Commission's action dismissing the petition for rehearing under 47 U. S. C. § 402(a) and the Judicial Review Act, 5 U. S. C. §§ 1031-1042, which is now 28 U. S. C. §§ 2341-2351 (356 F. 2d at 238). While the Court did not discuss the question of ripeness, it clearly considered the dispute ripe for judicial determination, or presumably it would not have reviewed it.

A common theme runs through both the cases holding a claim of denial of Ashbacker rights final and ripe for review prior to a hearing, and those holding a claim of unlawful rulemaking ripe for review prior to the impact of the administrative action on the complaining party.

These cases illustrate the principle that a court may and properly should review administrative action to determine whether the agency has afforded parties interested in and affected by its action their full statutory right to participate in the proceedings before the complaining party is injured thereby. Delaying review defeats the purpose of the statute, which is to guarantee the party a hearing or an opportunity to participate before the agency takes a final action. That this right to participate is statutorily granted is significant. Review is proper even in the absence of a final order where the agency acts in excess of its statutory powers or deprives a party of statutory rights. See Leedom v. Kyne, 358 U.S. 184 (1958). Review is also proper because of the denial of petitioners' Constitutional right of due process, which in this administrative context means an Ashbacker hearing. See Fay v. Douds, 172 F.2d 720 (2 Cir., 1949). The First Amendment implications of the exclusion of the factor of diversification are also pertinent here.

The leading case on the law of ripeness is Abbott Laboratories, Inc., v. Gardner, 387 U.S. 136 (1967), in which the Supreme Court said:

"The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (387 U.S. at 149.)

Under the first part of this test, the fitness of the issues for judicial decision, it cannot be denied that the Policy Statement is ripe for review and the opposing parties do not even mention this factor. The issues raised on this appeal are "purely legal" questions. Abbott Laboratories, Inc., v. Gardner, 387 U.S. 136, 149 (1967).

The question whether the Policy Statement denies a competing applicant the full comparative hearing to which he is entitled under 47 U. S. C. § 309 (e) and Ashbacker is a question of law. It is a matter of statutory interpretation involving a comparison of the hearing procedures spelled out in the Policy Statement with the requirements of the statute and the case law. The same is true of the legality of a controlling preference for substantial performance, and the question whether "substantial" is a sufficiently precise standard. Both of these are questions of law. So, too, the question whether the Commission was engaged in rulemaking in the Policy Statement is a question of law also involving statutory interpretation, as is the question whether the Commission has exceeded its authority under the Communications Act. And the question whether the Commission, without taking any evidence on the matter, can exclude diversification of the media from consideration is a question involving the First Amendment. All of these are pure questions of law and thus fit for judicial decision in this proceeding. The completely legal nature of the issues before the Court clearly indicates that this dispute is ripe for judicial review.

¶
The second factor to be considered on the question of ripeness is the hardship to the parties of withholding court consideration. As was indicated in Abbott Laboratories v. Gardner, 387 U. S. 136, 152-154 (1967) that question is to be considered in the context of the case before the Court, not by any absolute standard. Withholding court consideration here would work a serious hardship and a real injustice on the petitioners which the Court can and properly should prevent.

Petitioners have shown in their principal brief that the Policy Statement deprives them of their statutory rights under 47 U. S. C. § 309(e) and the Ashbacker case. The opposing parties contend that this is no reason for immediate review by this Court, for these matters can be raised on an appeal from a final grant to the renewal applicant, just as any other issues in the case. However, the statutory right which petitioners have been denied is a procedural right - the right to a full comparative hearing on the merits of their applications in the first instance. That right to a hearing will be effectively destroyed if the Commission can require the petitioners to go to the great expense and effort of prosecuting their cases through to a final decision in favor of the opposing party before they are able to obtain review and a proper hearing. That clearly is not what the Congress intended when it gave an applicant a right to a full hearing in the statute. This is surely one of the considerations which have led this Court in the past to grant review of interlocutory orders denying parties their rights under Ashbacker. See Delta Air Lines, Inc. v. Civil Aeronautics Board, supra, et al. Where the standing of parties to seek review of an administrative action is not in doubt, as where the action is directed at them in particular, the substantial financial expense which those parties will be put to if review is denied is a hardship which the Court may properly take into account in finding the case ripe for review. See Abbott Laboratories v. Gardner, 387 U. S. 136, 153-154 (1967); and see City of Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U. S. 77, 84 (1959).

Furthermore, petitioners are not the only parties whose rights are

affected here. The public is a party to this action also, not only through the citizens groups actively participating, BEST and C. C. C., but also in the wider sense that the Policy Statement works a profound change in the right of any member of the public to compete with a renewal applicant for a broadcasting license. The fact that the Policy Statement is self executing in this regard, i. e., the fact that the mere issuance of the Policy Statement has served to deter the filing of a single competing application for over a year, is a compelling reason for the Court to find this dispute ripe for review.

In his chapter on the question of ripeness for review, 3 Davis, Administrative Law Treatise, Ch. 21 (1958) states:

"Because problems of ripeness of administrative action and problems of ripeness of statutes for judicial review seem inseparable, the two sets of problems are considered together." (3 Davis, § 21.01, p. 116.)

In § 21.03, Self-Executing Statutes, the author states:

"Clearly unsound is the easy assumption that a statute cannot be ripe for challenge until it has been applied by an administrator, a prosecutor, or some other enforcement officer, in a concrete case. The reason for the unsoundness is the exceedingly important fact that some statutes are self-executing or are enforced by action of private parties."

It is apparent that the Policy Statement was intended by the Commission to be, and is, self executing. By depriving competing applicants of their right to a full comparative hearing on the merits of their applications, and excluding from consideration the only factors on which a competing applicant could base any hope of success, diversification and integration, the Commission has effectively deprived the public of its right to compete with renewal applicants. The Supreme Court has held on a number of occasions

that a statute or ordinance may be ripe for challenge, in advance of enforcement, threat of enforcement, or application, when important interests are adversely affected by the mere existence of the statute or ordinance. See, e. g., Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Public Utilities Commission v. United States, 355 U. S. 534 (1958); Pierce v. Society of Sisters, 268 U. S. 510 (1925); A. F. L. v. Watson, 327 U. S. 582 (1946).

Here the right of members of the public to compete with applicants for renewal of broadcast licenses has been adversely affected by the issuance of the Policy Statement. That is a factor which must weigh heavily in favor of the Court's finding the Policy Statement ripe for review.

Under all the circumstances of this case, and in view of the real importance to the public interest of the questions raised in this case, it is submitted that the Court should find the Policy Statement ripe for review at this time.

THE POLICY STATEMENT IS UNLAWFUL

The arguments of the opposing parties on the lawfulness of the Policy Statement are substantially those made previously by the Commission and considered in petitioners' principal brief, so we shall merely comment briefly in reply.

In support of its contention that the denial of a comparative hearing on the merits of a competing application, and the grant of a controlling preference for substantial past performance, do not violate Ashbacker, the Commission states:

"Indeed, Ashbacker recognized that in renewal proceedings a new applicant was under a greater burden to 'make the comparative showing necessary to displace an established licensee.' 326 U.S. at 332." (Commission brief, p. 29)

However, the above language in Ashbacker constitutes express recognition by the Supreme Court of what was always the law until the Policy Statement was issued, namely, that a new applicant could displace an established licensee by a comparative showing. That is no longer the case. Now a new applicant can replace an established licensee only upon a showing of less than substantial service by the established licensee. The Commission has unquestionably changed the law, which is the function of the Congress, not the Commission.

On the question whether the Policy Statement is rulemaking, the opposing parties argue that these new provisions are not rules because a party can argue on the facts that they should not apply to his case. This is

a strange new standard for defining a rule. First of all, it does not make sense. How can the facts, necessarily those relating to the merits of the competing application, which may not even be in the record, change the standards to be applied in deciding the case? The standard is provided from outside, by the Commission through the Policy Statement. Secondly, a party can argue anything. Indeed, there is express provision in the rules for arguing that any rule should not apply (§ 1.3 of the Commission's Rules and Regulations). Thus, how can the right to argue that it should not apply be a distinction between a policy statement and a rule?

A rule is defined in the Administrative Procedure Act (5 U.S.C. § 551(4)) as:

" . . . the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. . . . "

And, as was said in Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942):

"The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. "

It cannot seriously be denied that the Policy Statement is a statement of general or particular applicability and future effect. Under § 551(4), then, a rule is "any part of [the Policy Statement] designed to implement law or policy. "

If the Policy Statement were merely a statement that the Commission considers stability and predictability in the broadcasting field to be in the public interest, that a record of substantial service, whatever that means, is entitled to consideration, that an expectancy of renewal has grown up over the years in the broadcasting industry (not on the basis of anything in the Communications Act, but because of the Commission's inability or failure to give renewal applications much more than a cursory glance for many years), and that all these factors will be taken into account when an incumbent licensee is challenged at renewal time by a competing applicant, although of questionable wisdom, the Policy Statement might indeed have been merely a policy statement.

It is manifest, however, that what the Commission has done is not only state a policy in favor of "stability," i. e., renewal applicants, it has implemented that policy -- with a vengeance. The Commission has implemented its policy in favor of stability by adopting the following rules which are to apply in future hearings involving renewal applicants and competing applicants:

1. The renewal applicant shall be granted a preference on a showing of substantial performance without serious deficiencies during the last license term.
2. A preference for substantial performance shall be controlling of the issues in the case.

3. If the renewal applicant makes a showing of substantial performance, there need be no hearing on the merits of the competing application.

4. If the renewal applicant makes a showing of substantial past performance, no other factors, including the need for diversification of the media, shall be considered at all.

On the face of § 551(4), these provisions of the Policy Statement are rules designed to implement in cases before the Commission the new policy in favor of incumbent licensees. The Commission's failure to comply with the rulemaking requirements of the A. P. A. is plainly unlawful.

The defense of the Commission's exclusion of the factor of diversification from renewal hearings rests on the thin reed of a proposed rulemaking. The fact that the Commission may, sometime in the future, adopt a rule providing for greater diversification of the media would hardly seem to justify the Commission in excluding from consideration in a hearing today the question whether the grant of one broadcast application rather than another would not better serve the ends and purposes of the First Amendment.

This Court's decision in Hale v. F. C. C., _____ U. S. App. D. C. _____, 425 F.2d 556 (1970), is clearly distinguishable from the situation presented by the Policy Statement. In Hale, the holding of a hearing was a matter within the Commission's discretion, for there was only one application pending, that of the renewal applicant. Under the Policy Statement

there are mutually exclusive applications before the Commission and a comparative hearing is required by statute (47 U.S.C. § 309(e)) and the governing law, Ashbacker, supra. Moreover, the question presented in a case to which the Policy Statement applies is not the abstract question raised in Hale:

"Appellants essentially argue that the fact of the concentration, without further showing, is enough to require a hearing to determine whether the license renewal would serve the public interest. This is in reality a challenge to the wisdom of the Commission's existing multiple ownership rules, which have allowed the granting of licenses to conglomerate structures of the kind involved here. Thus it is that, in the context of this particular renewal proceeding, appellants seek a hearing to effectuate an overhaul of the Commission's general policy that multiple ownership and resulting concentration are not per se against the public interest." (425 F.2d at 560)

The question at issue where there are mutually exclusive applications is which will better serve the public interest, convenience and necessity. The question relates to two or more particular proposals to operate a particular station in a particular community. Since one very important aspect of the public interest is the need for diverse and antagonistic sources of news and information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

Thus, for example, since the Commission must conduct a hearing to determine whether the public interest, convenience and necessity would be better served by a grant of Channel 3 in Norfolk, Virginia, to WTAR or

Hampton Roads, it simply cannot exclude from consideration the fact that the principals of WTAR presently control the only two daily newspapers in Norfolk, one of the 3 VHF television stations serving the city (Channel 3), a full time AM station and a powerful FM station, in addition to a number of other broadcasting stations and newspapers in the Virginia-North Carolina region. The fact that the Commission may, several years from now, adopt rules which would change this situation cannot justify the Commission in excluding all evidence of concentration of control over the media from the hearing between WTAR and Hampton Roads, or any other renewal applicants and competing applicants.

It may well be that the Commission has the discretion to overhaul its multiple ownership rules by rulemaking rather than by ordering hearings to consider essentially abstract questions in the context of a single station's renewal of license. But that does not mean that where the Commission must choose between competing applicants for the same license it can exclude from the case a factor of Constitutional significance merely because it is considering rulemaking in the area. Apart from legal considerations, one practical reason for this is that there is no assurance the Commission will ever adopt the proposed rule. The so-called Top 50 Markets Rule proposed several years ago, for example, was merely intended to prevent further concentration of media control in the nation's largest metropolitan areas; there was no suggestion of any divestiture of multiple owners from their holdings. Yet such is the power of the industry that even this modest

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proposal died on the vine. See Public Notice, 3 RR 2d 909; Notice of Proposed Rule Making, 5 RR 2d 1609; Report and Order, 12 RR 2d 1501. The possibility of future changes in the rules should not be the basis for excluding diversification from a comparative hearing today.

The Commission's contention that the Policy Statement is within the scope of its statutory authority and not an infringement on the right of the Congress to make or change the law has been effectively scuttled by a staff study of the Special Subcommittee On Investigations of the House Committee On Interstate And Foreign Commerce. The concluding paragraph of the lengthy and detailed report entitled "Analysis Of FCC's 1970 Policy Statement On Comparative Hearings Involving Regular Renewal Applicants," dated November 1970, states:

"The policy statement, as it stands, is a usurpation of legislative power, vested exclusively in Congress, by an agency which has ignored the public interest to the extent it may conflict with private broadcasting interests. Accordingly, the 1970 Policy Statement should be rescinded. In reconsidering its position on renewals, the Commission should, in accordance with its statutory mandate, proceed with a keen sensitivity for the public interest and mindful of its great responsibility to all Americans."

In view of all of the foregoing, the Commission's 1970 Policy Statement On Comparative Hearings Involving Regular Renewal Applications should be set aside by the Court.

Respectfully submitted,

February 16, 1971
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CLERK OF THE UNITED
STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,221

Citizens Communications Center, et al., APPELLANTS,

v.

Honorable Dean Burch, Chairman, Federal Communica-
tions Commission, et al., RESPONDENTS.

No. 24,471

Citizens Communications Center, Black Efforts for Soul
in Television, Albert H. Kramer, William D. Wright,
PETITIONERS,

v.

Federal Communications Commission and United States of
America, RESPONDENTS.

No. 24,491

Hampton Roads Television Corporation and Community
Broadcasting of Boston, Inc., PETITIONERS,

v.

Federal Communications Commission and United States of
America, RESPONDENTS,

RKO General, Inc. (RKO), Dudley Station Corporation,

United States Court of Appeals for the District of Columbia Circuit
WTAR Radio-TV Corporation, INTERVENORS.

FILED JAN 7 1971 On Petition for Review of Order of
Federal Communications Commission

Nathan J. Paulsen
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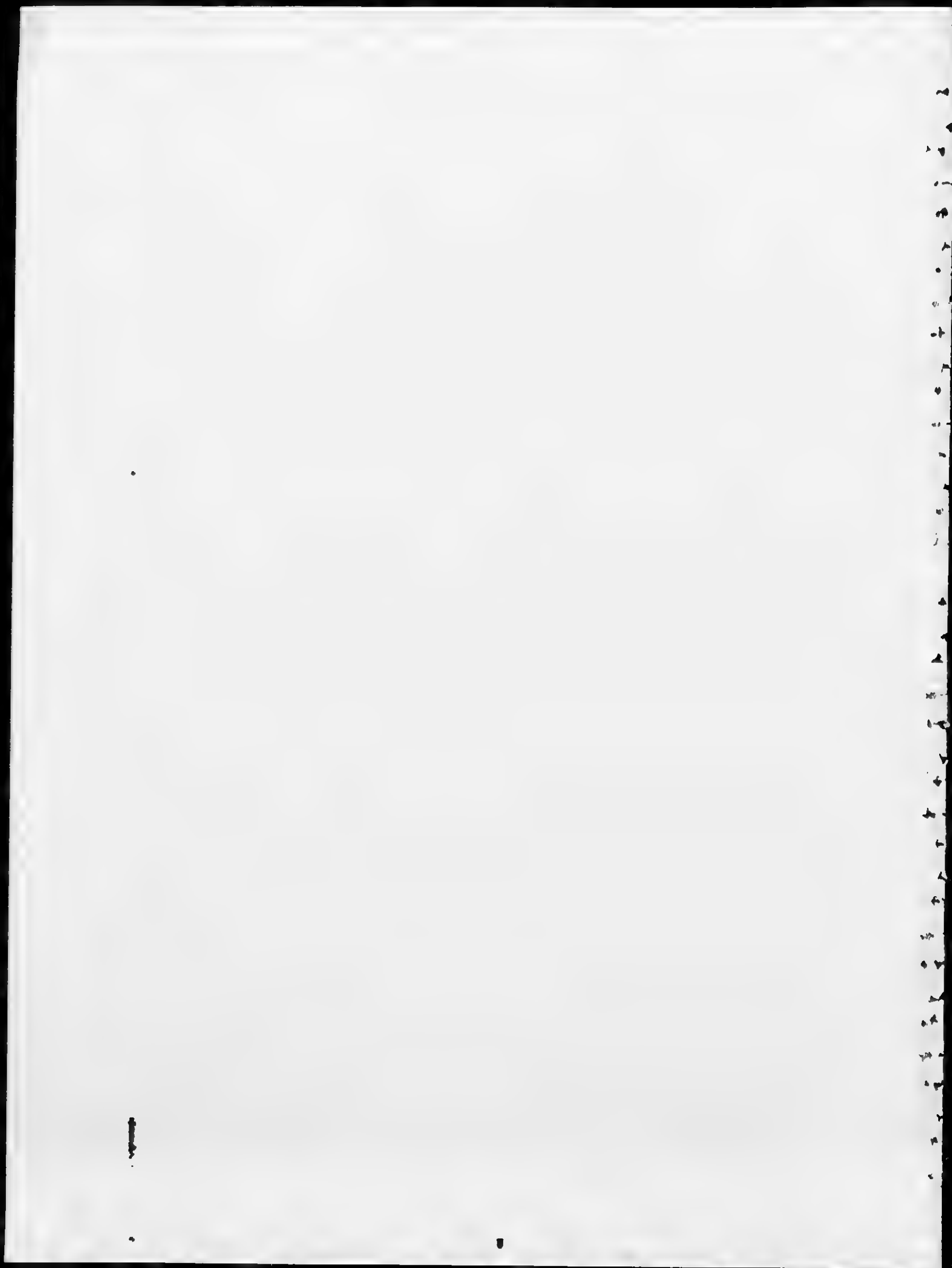
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v.

Federal Communications Commission and United States of
America, RESPONDENTS.

No. 24,491

Hampton Roads Television Corporation and Community
Broadcasting of Boston, Inc., PETITIONERS,

v.

Federal Communications Commission and United States of
America, RESPONDENTS,
RKO General, Inc. (RKO), Dudley Station Corporation,
and WTAR Radio-TV Corporation, INTERVENORS.

On Petition for Review of Order of
Federal Communications Commission

BRIEF FOR INTEVENOR WTAR RADIO-TV CORPORATION

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly dismissed for lack of jurisdiction the complaint of petitioners in Case No. 24,221.
2. Whether this Court has jurisdiction over the subject matter of the petitions for review in Case Nos. 24,471 and 24,491.
3. Whether the ripeness doctrine precludes judicial review of the Federal Communications Commission's Policy Statement at this time.
4. Whether the jurisdiction of this Court can be invoked pursuant to 47 U.S.C. §402(a), 28 U.S.C. §§2342, 2344, or the Administrative Procedure Act when petitioners are not appealing from a final order.
5. Whether, assuming arguendo the Court's jurisdiction over the subject matter of this action, the Commission's issuance of its Policy Statement is a reasonable and proper exercise of its statutory authority.

STATEMENT PURSUANT TO RULE 8(d)

This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

Petitioners in Case No. 24,491 and petitioners in Case No. 24,471 filed the instant petitions for review of

the Federal Communications Commission's Memorandum Opinion and Order, released July 21, 1970 (24 F.C.C.2d 383, 19 Pike and Fischer Radio Regulation ("R.R.") 2d 1902, denying reconsideration of the Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants (hereinafter referred to as the "Policy Statement"), released January 15, 1970 (22 F.C.C.2d 424, 18 R.R.2d 1901) pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a), and 28 U.S.C. §§2342, 2344; Section 10 of the Administrative Procedure Act, 5 U.S.C. §702; and Rule 15, Federal Rules of Appellate Procedure, 28 U.S.C.A.¹/ As shown below, it is the position of intervenor WTAR Radio-TV Corporation (hereinafter referred to as "WTAR") that this Court does not have jurisdiction over the subject matter of these petitions for review.

REFERENCES TO RULINGS

Memorandum Opinion and Order, adopted January 14, 1970 -- 21 F.C.C. 2d 355 (1970).

Memorandum Opinion and Order, adopted July 8, 1970 -- 24 F.C.C. 2d 383 (1970).

STATEMENT OF THE CASE

On January 15, 1970, the Commission issued its Policy Statement in which it set forth the standards appli-

¹/ Appellants in Case No. 24,221 appeal pursuant to 28 U.S.C. § 1291 from the judgment of the District Court dismissing their complaint for want of jurisdiction.

cable to comparative hearings where a new applicant is contesting with a licensee seeking renewal of its license. As the Commission made clear in its Policy Statement, it was not enunciating a new policy but simply was reiterating policies which already were in existence and which were being applied to recent comparative hearings -- "issuance of this statement [was to] contribute to clarity of our policies in this important area [of comparative hearings]" (J.A. 5). By the terms of the Policy Statement it was made applicable to pending and future proceedings of this nature, including the proceedings involving petitioners and intervenors in No. 24,491.

Petitioners in No. 24,491 and petitioners in No. 24,471 thereupon filed with the Commission petitions for reconsideration of the Policy Statement. The Commission denied these petitions for reconsideration in a Memorandum Opinion and Order, released July 21, 1970. The parties who had sought reconsideration before the Commission then petitioned this Court for review of that order and of the Policy Statement, and these cases were consolidated by an order of this Court on September 29, 1970. The intervention of WTAR in support of the Commission's action was granted by this Court on September 2, 1970.

It is WTAR's position that these petitions for review are prematurely brought before this Court. The

issues which they raise are not ripe for judicial review since the Commission's Policy Statement is simply a clarification of existing policies which are to be applied in future comparative hearings involving renewal applicants -- the Statement vests or denies no rights and does not impose any legal obligations or liabilities. Nor is it a "final order" which can be reviewed by this Court -- the issuance of the Policy Statement creates no immediate harm or irreparable injury prior to its application in a particular case. And, for these same reasons, the jurisdiction of this Court cannot be invoked by the Administrative Procedure Act. In any event, assuming, arguendo, that this Court has jurisdiction over the subject matter of this action, it is clear that the Commission properly exercised its statutory and administrative authority in issuing its Policy Statement which, in the Commission's reasoned judgment, will best serve the public interest.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE ACTION BELOW

Appellants in No. 24,221, pursuant to 28 U.S.C. § 1291, appeal from a decision of the United States District Court for the District of Columbia, entered on February 2,

1970, dismissing a complaint that sought to enjoin the Federal Communications Commission from issuing its Policy Statement. The complaint was dismissed for lack of jurisdiction on the ground that 47 U.S.C. §402(a) and 28 U.S.C. §§ 2342-2344 vest exclusive jurisdiction for judicial review of Federal Communications Commission action in the courts of appeals.

The District Court did not err in dismissing the complaint. Although the provisions of 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342-2344 providing for review by the courts of appeals do not preclude review by district courts in certain circumstances (See, e.g., Bucks County Cable T.V., Inc. v. United States, 299 F.Supp. 1325, 1333 (E.D. Pa. 1969); City of Trenton v. FCC, ___ F.Supp. ___, 16 R R 2d 2150, 2157, 2162 (D.N.J. 1969)), the instant action is not one where such circumstances are present. This is not a case, as will be shown more fully below, in which there are "abuses of constitutional or statutory authority which . . . could not be corrected by application to the agency" (City of Trenton v. FCC, id. at 2156) nor is it a case in which "[t]he prospect of ultimate appellate review of any final order issuing out of the . . . [challenged procedure] is not adequate" (Elmo Division of Drive-X Co. v. Dixon, 121 U.S. App. D.C. 113, 115, 348 F.2d 342 (1965), a case involving

the jurisdiction of the district court over a complaint against the Federal Trade Commission, whose actions are statutorily reviewable exclusively in the courts of appeals). Accordingly, appellants' appeal in No. 24,221 must be denied by this Court.

II. THIS COURT DOES NOT HAVE
JURISDICTION OVER THE SUBJECT
MATTER OF THIS ACTION

A. The Ripeness Doctrine Precludes Judicial
Review of the Federal Communications
Commission's Policy Statement At this Time

Petitioners in Nos. 24,471 and 24,491 invoke the original jurisdiction of this Court pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342, 2344, and 5 U.S.C. § 702. The failure of the petitioners to meet the provisions of any of these statutes is shown below. It initially must be shown, however, that the ripeness doctrine of administrative law, codified by these statutes, precludes judicial review of the Commission's Policy Statement at this time.

Thus, the reluctance of courts to intervene in the workings of administrative agencies is manifest in the ripeness doctrine, which the Supreme Court has described as follows:

[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in

abstract disagreements of administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. [Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).]

In accordance with this rationale, this Court consistently has exercised the judicial restraint called for by the ripeness doctrine and has refused to interject itself prematurely in agency decision-making:

The Supreme Court has said the pronouncements, policies, and programs of a government administrative agency do not give rise to a justiciable controversy, save as they have fruition in action of a definitive and concrete character constituting an actual or threatened interference with the rights of persons complaining. [Helco Products Co. v. McNutt, 78 U.S. App. D.C. 71, 73, 137 F.2d 681 (1943).]

[A]dministrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of administrative process." [Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 297, 211 F.2d 51 (1954).]

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This Court therefore cannot permit the petitioners to invoke its jurisdiction at this juncture, for to do so would ignore the evils that the ripeness doctrine serves to prevent and the principles that this Court has recognized in its review of actions of administrative agencies. The

action of the Federal Communications Commission that petitioners present for review by this Court is the issuance by the agency, on January 15, 1970, of its Policy Statement. This Policy Statement, issued to "contribute to [the] clarity of [its] policies" already existing in the area of comparative hearings where a new applicant is contesting with a licensee seeking renewal of its license, reiterated the Commission's policy to grant the renewal application of a broadcast licensee who, in a hearing with a competing applicant, shows that its "program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies." (J.A. 6.) Thus, the Policy Statement is simply a statement of the intent of the Commission to apply such a policy in future comparative hearings involving renewal applicants; the Statement is not itself an application of a policy nor is it directed at any applicant or party to a Commission proceeding. It vests or denies no rights, nor does it impose any legal obligations or liabilities. The Policy Statement is not a final order in any sense of those words (see infra) and it forecloses no previously existing opportunities to unsuccessful applicants to challenge the policy as applied to them within the Commission and, ultimately, in the courts.

Moreover, no irreparable injury to any of the petitioners herein occurs as a consequence of the issuance of the Policy Statement. The two petitioners in No. 24,491 are both applicants currently engaged in comparative hearings with renewal applicants in which the new policy will be applied and, thus, they will have an opportunity rapidly to test the legality of the policy by appealing to the Commission and to the courts. In point of fact, petitioners may be successful at their hearings notwithstanding the Policy Statement and therefore would not be injured in any way by this policy. Likewise, the existence of the Policy Statement causes no irreparable injury whatsoever to petitioners in No. 24,471, who say that they are non-profit organizations operating for the purpose of improving radio and television service and "improving the position of minority groups in media ownership, access and coverage." (Brief of Petitioners in 24,221 and 24,471 at p. 4.) These petitioners can continue to work for their goals in the same way as before the issuance of the Policy Statement while awaiting the judicial review of the Policy Statement that may result from the pending hearings of petitioners in No. 24,491.

In short, the circumstances of the instant case show absolutely no reason for this Court to deviate from the

clearly enunciated principles of the ripeness doctrine and intervene in the workings of the Commission simply because that Commission has stated a prospective policy which has yet to result in the grant or denial of a single license. The statement of policy still must face application in a concrete case. For this Court to interject itself into the agency process before the final determination of the public interest by the Commission statutorily charged with such determination, and expertly equipped for the task, would be contrary to the prudent counsel of the law of administrative judicial review.

B. The Jurisdiction of this Court Cannot Be Invoked
Pursuant to 47 U.S.C. § 402(a) or 28 U.S.C.
✓ §§2342, 2344 Because Petitioners Are Not
Appealing from a Final Order

The sections of the United States Code claimed by petitioners to give jurisdiction to this Court are set forth in pertinent part as follows:

47 U.S.C. § 402(a) -- Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under sub-section (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5. [This chapter is now codified at 28 U.S.C. § 2342(1).]

28 U.S.C. § 2342 -- The Court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . .

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344 -- On the entry of a final order reviewable under this chapter . . . Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies . . .

These statutes permit appeals to this Court only from "final orders" of the Federal Communications Commission. The Policy Statement here challenged is not such a final order and thus this Court is without jurisdiction to hear this appeal.

An exhaustive consideration of the question of the finality of Commission orders was recently made by a federal court in New Jersey. (City of Trenton v. FCC, supra.) In that case a CATV system franchised to operate in Trenton, New Jersey, challenged in district court the automatic stay provision of the Commission's CATV rules, codified at 47 C.F.R. § 74.1105(c). The challenge in that case, unlike the Policy Statement herein, was directed at a final rule promulgated by the Commission pursuant to its rule-making authority and, also unlike the Policy Statement, had an immediate impact on the plaintiffs by preventing them

from receiving and distributing in Trenton via cable the signals of New York television stations. Despite the formality of the rule and its direct impact, however, the court ruled that it was not sufficiently final to be reviewable pursuant to 47 U.S.C. § 402(a). The court said that "the 402(a) method of review enables the FCC to proceed, without prior judicial intervention, to pursue administrative procedures which lead to an order." (Id. at 2158). Because the stay provision, although a formal rule, was but a step in a procedure prior to a final order and because "the FCC has not finally adjudicated plaintiffs' interest but rather the door remains open for further explorations and determinations by the FCC" (Id. at 2159), the Court held the stay provisions of these CATV rules not a final order under § 402(a) and the related sections of the judicial code. A fortiori, the Policy Statement herein, which was not promulgated pursuant to the Commission's rule-making authority, which has no direct impact on the petitioners, and, like the stay provisions of the CATV rules, is merely an action of the Commission prior to a hearing, subsequent review, and the issuance of a final order, is not reviewable. See also Bethesda-Chevy Chase Broadcasters, Inc. v. FCC, 128 U.S. App. D.C. 185, 385 F.2d 967 (1967).

Two Supreme Court cases often invoked in support of the reviewability of agency decisions deserve considera-

tion here because of the tests of "finality" that they present. One of the cases, Columbia Broadcasting System v. United States, 316 U.S. 407 (1942), considered whether an action of the Commission was reviewable pursuant to §402(a). The action there challenged was a formal order of the Commission denying the grant of licenses, at the time of their renewal, to broadcast stations that had certain contracts with broadcasting networks. The Court upheld the CBS network's invocation of judicial review of the order and made these comments on the immediate and irreparable injury that allowed such review:

It is enough that failure to comply with [the regulations] . . . penalized licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable. . . . [Id. at 417.]

If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance of [license renewal hearings] . . . [I]t is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant . . . [W]hen . . . [regulations] are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act. [Id. at 418-19.]

It is to avoid the irreparable injury which would result from such wholesale

cancellations of its contracts, induced by the force of the regulations, that appellant makes its attack on them now rather than in later proceedings on the individual applications . . . [Id. at 423.]

Similarly, in Abbott Laboratories v. Gardner, supra, the Court found a formal order of the Food and Drug Administration reviewable, even though it had not yet been enforced, because of the substantial direct and immediate impact of the regulation on the plaintiffs:

The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. [Id. at 151.]

It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted. . . [Id. at 153.]

The circumstances that made agency action reviewable in CBS and Abbott are absent in the case at bar. Here, no formal order has been promulgated pursuant to the rule-making power ✓

of the Commission. Here, the issuance of the Policy Statement creates no immediate harm or irreparable injury prior to its application in a particular case. And here, the issuance of the Policy Statement alters no legal relationships and causes no change in the conduct of petitioners.

Accordingly, the issuance of the Policy Statement is not a final order of the Federal Communications Commission, and this Court is without jurisdiction to review it.

C. The Jurisdiction of This Court Cannot Be Invoked Pursuant to the Administrative Procedure Act

Petitioners in No. 24,491 cite a section of the Administrative Procedure Act ("APA"), 5 U.S.C. §702, as a basis for the jurisdiction of this Court. That section provides as follows:

5 U.S.C. § 702 -- A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Although petitioners cite only §702 of Title 5, that section establishing the right of judicial review must be read in conjunction with §704 (City of Trenton v. FCC, supra, at 2164), which describes the actions that are made reviewable. That section reads in pertinent part as follows:

5 U.S.C. §704 -- Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to

judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action . . .

Thus, the APA permits judicial review of agency action when three prerequisites are met; (1) a person must suffer a legal wrong or be adversely affected or aggrieved, (2) there must be a relevant statute giving that person access to the court, and (3) the agency action must either be made reviewable by statute or be final. With regard to the third prerequisite, petitioners have shown no statute permitting review of an issuance of a policy statement, and, as shown above, such an issuance is not a final order. This prerequisite to APA review, then, has not been met, and this alone is sufficient to deny this Court's jurisdiction pursuant to the APA. As we now show, however, prerequisites one and two are also missing in the instant case.

Thus, the requirement of the APA that a person seeking judicial review under its provisions must suffer a legal wrong or be adversely affected or aggrieved (its first prerequisite for judicial review) is simply a codification of the law of standing and does not create any new rights to judicial review. Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 280-281, 225 F.2d 924 (1955).

It is clear that the Administrative Procedure Act has in no way altered the basic principle that one must have

suffered a "legal wrong" in order to have standing to challenge the Government action. . . . The words "legal wrong" under the Act have been interpreted to mean the invasion of a legally-protected right. [Los Angeles Customs & Freight Brokers Assn. v. Johnson, 277 F. Supp. 525, 534 (C.D. Cal. 1967).]

This Court has also recognized that, absent a separate statute permitting review, only those "whose legal rights have been violated" can sue under the APA. [Kansas City v. McKay, supra at 281.] Petitioners herein have failed to show that they possess any legal rights that were violated as a result of the issuance of the Policy Statement.

Circular

The remaining prerequisite for the invocation of judicial review under the APA is the existence of a "relevant statute" giving standing to the plaintiff to sue. Such a statute is required by the terms of §702 because the APA creates no jurisdiction for the Federal courts not already given to them by separate statutes.

There is nothing in . . . [the APA] which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence. . . . The Act is clearly remedial and not jurisdictional. [Local 542 v. N.L.R.B., 328 F.2d 850, 854 (3d Cir. 1964).]

Any person suing pursuant to 5 U.S.C. §702 must cite a specific statute giving him the right to invoke the jurisdiction of the court.

[T]he clause in 5 U.S.C. §702 reading "adversely affected or aggrieved by agency action within the meaning of a relevant statute". . . refers only to situations in which a particular statute expressly confers standing on a person who is adversely affected or aggrieved by agency action under that statute. [Harry H. Price & Son, Inc. v. Hardin, 299 F.Supp. 557, 562 (N.D. Texas 1969).]

Such a statute is an absolute prerequisite to standing pursuant to this portion of Section 702. [Los Angeles Customs & Freight Brokers Assn. v. Johnson, supra at 535.]

Petitioners have cited no relevant statutes other than 47 U.S.C. §402(a) and 28 U.S.C. §2342 which, as was discussed above, are not apposite because they permit review only from a final order. The APA, therefore, may not be relied upon by petitioners in the instant case to invoke the jurisdiction of this Court.

III. THE COMMISSION'S ISSUANCE OF ITS
POLICY STATEMENT IS A REASONABLE
AND PROPER EXERCISE OF ITS
STATUTORY AUTHORITY

If, despite the authority presented above, this Court assumes jurisdiction over this cause, it must find that the issuance of the Policy Statement is a lawful exercise of the Federal Communications Commission's duty to regulate the use of broadcast frequencies "as public convenience, interest, or necessity requires." 47 U.S.C. § 303.

The following discussion in support of that position is intentionally brief since it is fully anticipated that the Commission, as respondent, will develop in detail the substantive merits of its Policy Statement. WTAR, as intervenor, wholly supports the Commission's action but has concentrated its efforts in this brief on the jurisdictional issues which WTAR believes are dispositive of the case.

Petitioners contend that the Policy Statement, if applied to grant a license renewal to a licensee after a comparative hearing has established the licensee's substantial attunement to the needs of its broadcast area, would operate to deny a hearing to the competing applicant in violation of 47 U.S.C. §309. In support of its position, petitioners rely on Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) where the Supreme Court held that a hearing granted to an applicant for a frequency which already was being utilized pursuant to an unexpired license did not meet the requirements of 47 U.S.C. §309(e). Such a hearing, the Court found, would be an exercise in futility:

The applications are for a facility which can be granted to only one. Since the facility has been granted to Fetzer, the hearing accorded petitioner concerns a license facility no longer available for a grant until the earlier grant is recalled. [Id. at 332-33]

However, the Ashbacker case, contrary to the argument of petitioners, makes no ruling as to the issues to be considered at the hearing on mutually exclusive applications. Its only holding is that a hearing on an application for a frequency already awarded and not up for renewal is impermissible. *But Does It require a Compulsory hearing*

Moreover, the hearing requirement of § 309 must be read in the light of the interpretation given it by the Supreme Court in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). In that case a license application was denied without a hearing because the applicant owned more than the maximum number of stations permitted by the multiple-ownership policy of the Commission. The unsuccessful applicant argued, as do petitioners here, that the denial of the application without a hearing was a violation of § 309. The Court ruled otherwise, holding that applications contrary to the Commission's definition of public interest need not be afforded a hearing:

Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress had decided are in the public interest. . . .

The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. [Id. at 202-03.]

Thus, there is no merit to petitioners' contention that the Policy Statement acts to deny a hearing to applicants competing with renewal applicants. The Policy Statement requires such applicants to participate fully in a hearing on the broadcast operation of the renewal applicant; if such operation has not substantially met the needs of the community, the applicants continue to participate in a hearing on the merits of the competing applications. Under the rationale of Storer this is all that is required. Clearly, such a hearing is consistent with the Commission's policy determination to secure the stability and predictability of the broadcast industry, a public interest recognized by this Court in WHDH v. FCC, No. 17,788 (D.C. Cir., Nov. 13, 1970):

[T]he rights and expectancies of an ordinary renewal applicant. . . are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. [Id. at p. 33 slip opinion.]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for review in Case Nos. 24,221, 24,471 and 24,491 be dismissed.

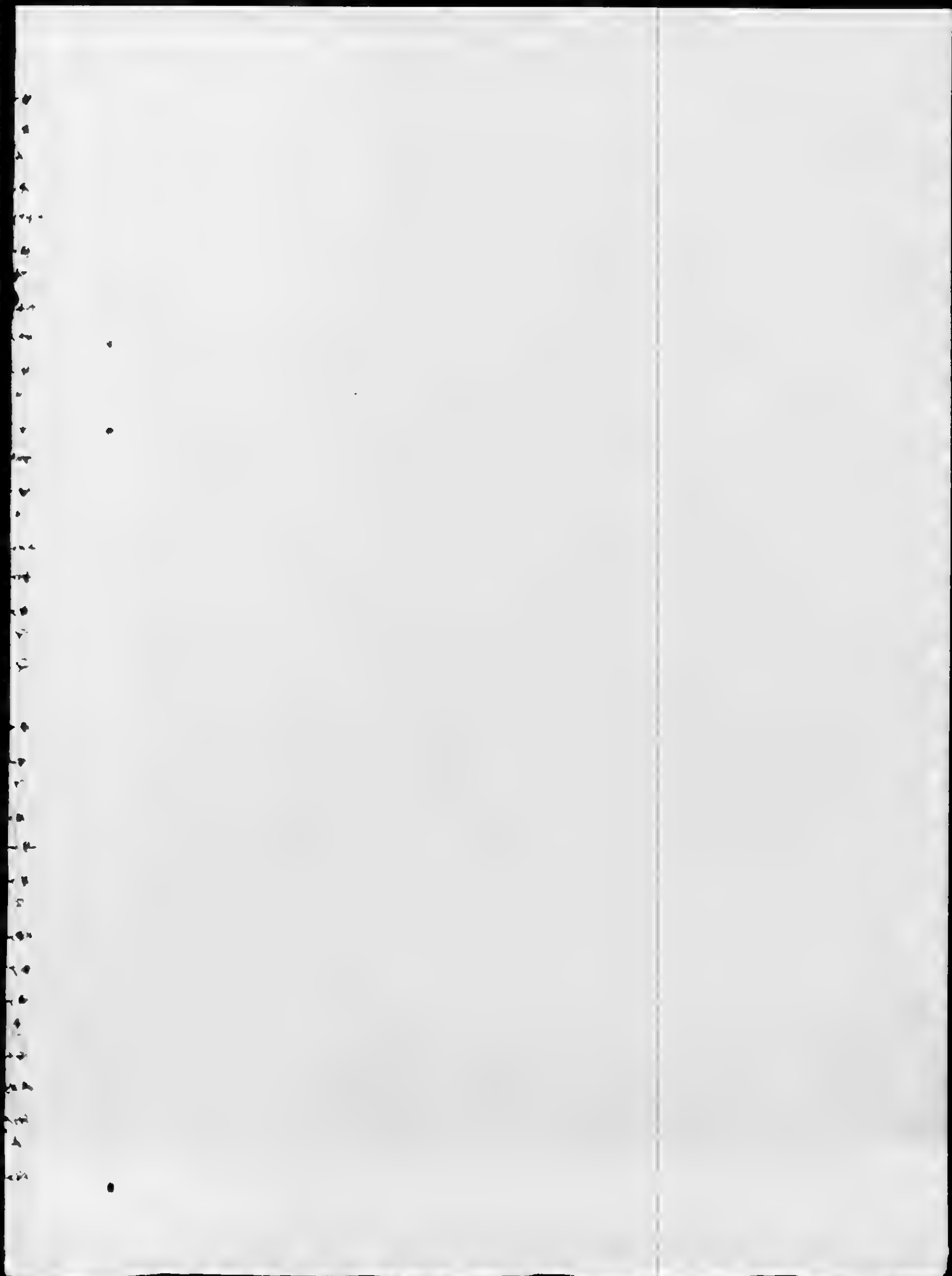
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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,221

CITIZENS COMMUNICATIONS CENTER, et al.,
Appellants,

v.

HONORABLE DEAN BURCH, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION, et al.,
Appellees.

No. 24,471

CITIZENS COMMUNICATIONS CENTER, BLACK EFFORTS FOR SOUL
IN TELEVISION, ALBERT H. KRAMER, WILLIAM D. WRIGHT,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

No. 24,491

HAMPTON ROADS TELEVISION CORPORATION and
COMMUNITY BROADCASTING OF LOSION, INC.,
Petitioners,

v.

UNITED STATES COURT OF APPEALS
for the District of Columbia
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

FILED JAN 2 1957

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PETITIONS TO REVIEW THE FEDERAL COMMUNICATIONS
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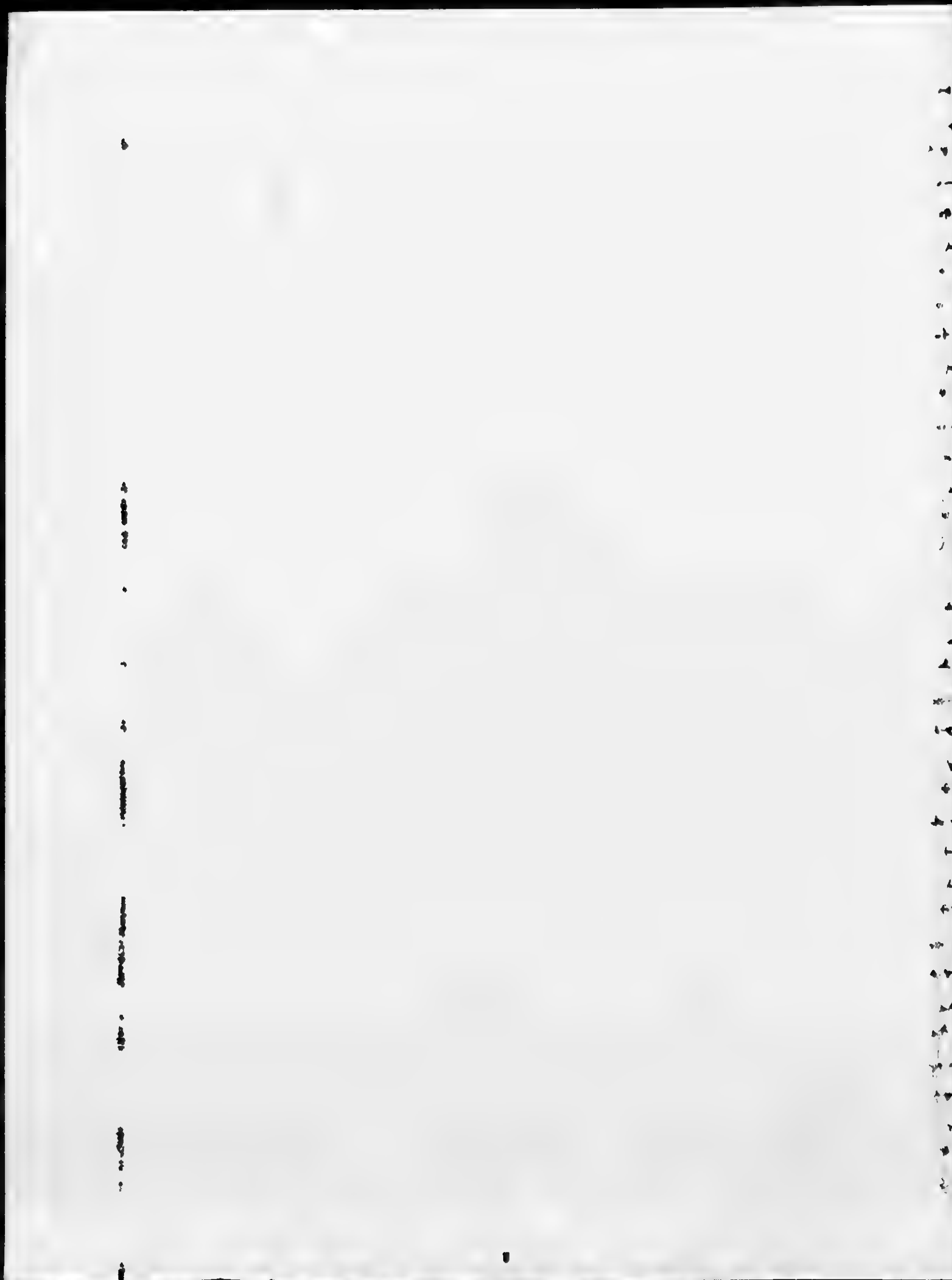


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* <u>Ashbacker Radio Corp. v. F.C.C.</u> , 326 U.S. 327 (1945).	27, 28, 29, 32
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<u>Chicago & Southern Air Lines v. Waterman Steamship Corp.</u> , 333 U.S. 103 (1948).	18
* <u>Chicago Federation of Labor v. F.R.C.</u> , 59 App. D.C. 333, 41 F.2d 422 (1930).	31
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* <u>Edwin R. Fischer v. F.C.C.</u> , 135 U.S. App. D.C. 134, 417 F.2d 551 (1969).	34, 46

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* <u>Greater Boston Television Corp. v. F.C.C.</u> , ____ U.S. App. D.C. ____, ____ F.2d ____ (Case No. 17,785 <u>et al.</u> , decided November 13, 1970).	4, 16, 25, 31, 32, 37, 44
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* <u>Hinton v. Udall</u> , 124 U.S. App. D.C. 283, 304 F.2d 676 (1966).	22
<u>Isbrandsten v. United States</u> , 93 U.S. App. D.C. .293, 211 F.2d 51, <u>cert. den. sub nom. Japan-</u> <u>Atlantic & Gulf Conference v. United States</u> , 347 U.S. 990 (1954).	18
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* <u>Meredith Broadcasting Co. v. F.C.C.</u> , 124 U.S. App. D.C. 379, 365 F.2d 912 (1966).	17, 23, 24, 46
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* <u>Pinellas Broadcasting Co. v. F.C.C.</u> , 97 U.S. App. D.C. 236, 230 F.2d 204, 350 U.S. 1007 (1956).	5, 30
* <u>Red Lion Broadcasting Co. v. F.C.C.</u> , 395 U.S. 367 (1969).	35, 36, 37
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| * <u>Toilet Goods Ass. v. Gardner</u> , 387 U.S. 158 (1967). | 22, 24 |
| <u>United Church of Christ v. F.C.C.</u> , 123 U.S. App. D.C. 328, 359 F.2d 994 (1966). | 36 |
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| * <u>Yankee Network, Inc. v. F.C.C.</u> , 71 App. D.C. 11, 107 F.2d 212 (1939). | 32 |

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| <u>Chronicle Broadcasting Co.</u> , 16 F.C.C. 2d 882 (1969). | 26 |
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| * <u>Hearst Radio Inc.</u> , 15 F.C.C. 1149 (1951). | 6, 9, 30, 31, 44 |
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| * <u>Wabash Valley Broadcasting Corp.</u> , 35 F.C.C. 677 (1965). | 6, 30 |
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Statutes:

* Administrative Procedure Act, Section 4, 5 U.S.C. 553	2, 40, 42, 43, 46
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Rules and Regulations of the Federal Communications
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Other Authorities:

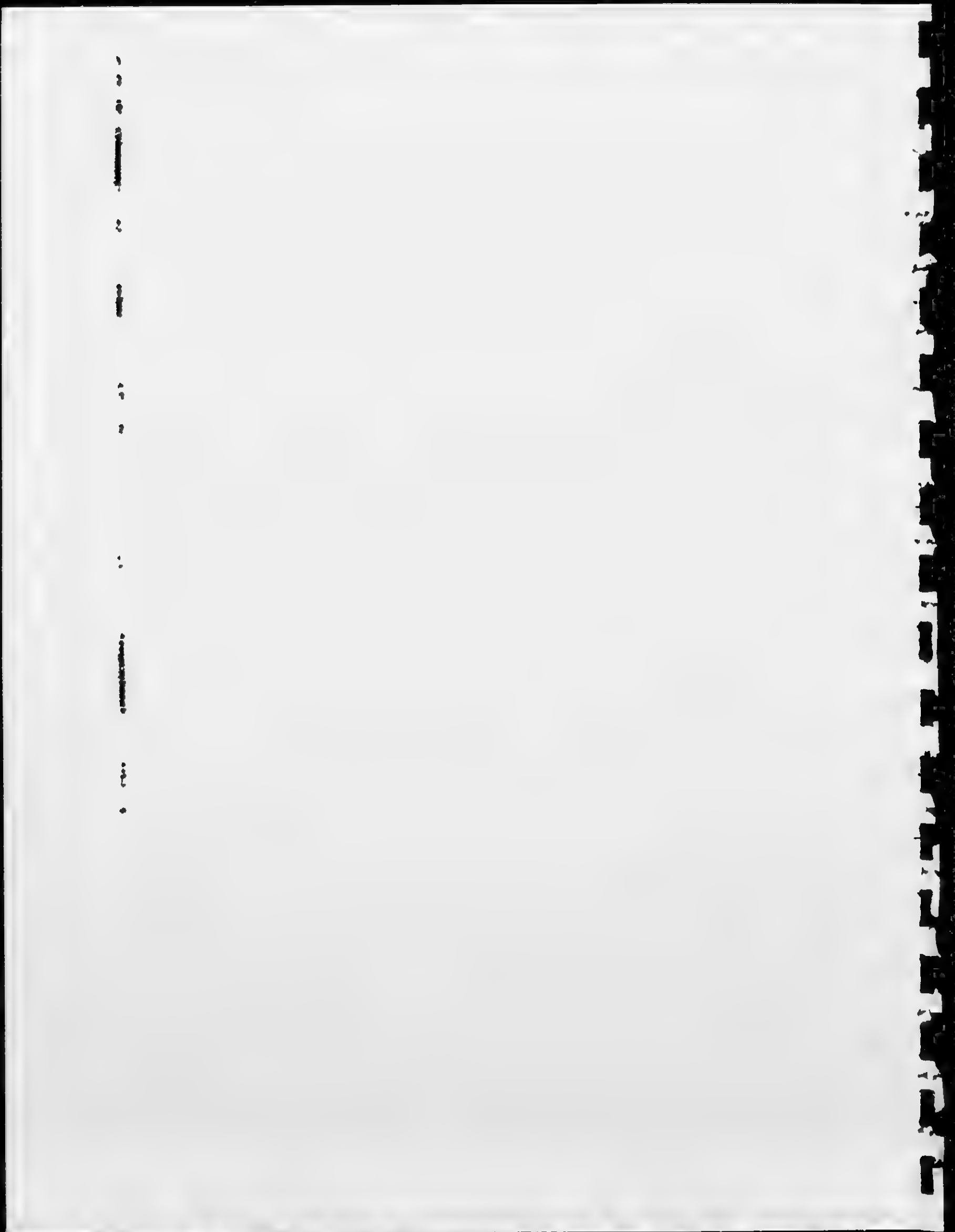
* <u>Attorney General's Manual on the Administrative Procedure Act (1947).</u>	42
* <u>Final Report of the Attorney General's Committee on Administrative Procedure, 79th Cong., 1st Sess. (1941).</u>	42
Goldin, <u>The Aftermath of WHDH in FCC License Renewal Policy</u> , 83 Harv. L. R. 1014 (1970).	32, 39
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* H. Friendly, <u>The Federal Administrative Agencies</u> (1962).	5, 32, 37
Jaffe, <u>WHDH: The FCC And Broadcasting Renewals</u> , 82 Harv. L. Rev. 1693 (1969).	32

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Other Authorities:

- * K. C. Davis, Discretionary Justice. A Preliminary Inquiry (1969). 43, 49
- Nondiscrimination Employment Practices of Broadcast Licensees, 33 F. R. 9960, 13 F.C.C. 2d 766 (1968). 38
- Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965). 5, 9, 12, 20, 42, 46
- Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1960). 46
- Primer on Ascertainment of Community Problems by Applicants, 20 F.C.C. 2d 880 (1970). 34
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- The FCC and Broadcast License Renewal, 36 U. of Chi. L. R. 854 (1969). 32, 34
- * Wall and Jacobs, Communications Act Amendments, 1952, 41 Georgetown L. J. 135 (1953). 6, 31, 32

*Cases and other authorities principally relied upon are marked with an asterisk.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,221

CITIZENS COMMUNICATIONS CENTER, et al.,
Appellants,

v.

HONORABLE DEAN BURCH, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION, et al.,
Appellees.

No. 24,471

CITIZENS COMMUNICATIONS CENTER, BLACK EFFORTS FOR SOUL
IN TELEVISION, ALBERT H. KRAMER, WILLIAM D. WRIGHT,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

No. 24,491

HAMPTON ROADS TELEVISION CORPORATION and
COMMUNITY BROADCASTING OF BOSTON, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

WTAR RADIO-TV CORPORATION,
RKO GENERAL, INC.,
THE DUDLEY STATION CORPORATION,
Intervenors.



PETITIONS TO REVIEW THE FEDERAL COMMUNICATIONS
COMMISSION POLICY STATEMENT ON COMPARATIVE
BROADCAST HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS

BRIEF FOR RESPONDENTS

STATEMENT OF QUESTIONS PRESENTED ^{*/}

1. Is the Commission's Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants a final order or one which is ripe for review.
2. Is the Commission's conclusion that a renewal applicant's record of substantial service to the public without serious deficiencies overbalances other comparative factors unreasonable or unlawful.
3. Did the Commission exceed or abuse its authority when it concluded, that in this area of its broadcast jurisdiction, issuance of a policy statement was more desirable than a formal rule.

^{*/} This case has not previously been before this Court. However, the Court has previously dismissed a petition filed by one of the parties to the present case seeking review of a Commission order designating an application for hearing in accordance with the Policy Statement. Hampton Roads Television Corp. v. F.C.C., Case No. 24,199, June 25, 1970.

COUNTERSTATEMENT OF THE CASE

Proceedings Below

Case No. 24,221 is an appeal filed pursuant to 28 U.S.C. 1291 from an order of the United States District Court for the District of Columbia dismissing a "Complaint for Permanent and Preliminary Injunction," Civil No. 42-70, for lack of jurisdiction. In their complaint filed January 7, 1970, appellants, Citizens Communications Center and Black Efforts for Soul in Television (CCC and BEST) identified themselves as unincorporated associations interested in "promoting improved radio and television service in the United States" (CCC) and "increasing the participation of the black community in radio and television broadcasting" (BEST). CCC and BEST sought to enjoin the Chairman and members of the Federal Communications Commission from "promulgating any policy, rule or interpretation or making any other change" in the standards applicable to comparative broadcast license renewal proceedings without first giving all interested parties notice and an opportunity to be heard pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. A temporary restraining order was denied on January 7, 1970; and following a Suggestion of Lack of Jurisdiction made by the Commission, the District Court on January 23, 1970, dismissed the action.

Case No. 24,471 is a petition filed by CCC and BEST pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342 seeking review of (1) the Commission's Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 35 F. R. 822, 22 F.C.C. 2d 424 (J.A. 5-14); (2) a Memorandum Opinion and Order by the Commission dismissing a request of CCC and BEST that it institute rule-making proceedings to codify standards for all comparative proceedings, 22 F.C.C. 2d 353 (J.A. 15-17); and (3) a Memorandum Opinion and Order denying reconsideration of the 1970 Policy Statement and the refusal to institute rulemaking proceedings, 24 F.C.C. 2d 383 (J.A. 18-27).^{1/}

Case No. 24,491 is a petition for review filed by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc., two applicants for television channels who have filed in competition with renewal applicants in Norfolk, Virginia and Boston, Massachusetts. They seek review pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342 of the Commission's Memorandum Opinion and Order denying reconsideration of the 1970 Policy Statement and the refusal to institute rulemaking proceedings, 24 F.C.C. 2d 383 (J.A. 18-27).

^{1/} CCC and BEST have apparently abandoned their appeal from the District Court's order dismissing the "Complaint for Permanent and Preliminary Injunction," the appeal is not discussed in their statement of issues, argument, or request for relief. They have directed all of their attention to Case No. 24,471, the petition to review the Commission's actions.

General Background

The Federal Communications Commission is authorized by Congress to grant broadcast licenses. 47 U.S.C. 301-304, 307-309. Such licenses are granted for a term not to exceed three years and they may be renewed for three-year periods. 47 U.S.C. 307(d). When two or more otherwise qualified entities apply for the same facilities, a comparative hearing is held to determine which applicant should be awarded the license. Comparative hearings are held not only on multiple applications for a new facility but also where applications are filed which conflict with renewal applications. See Greater Boston Television Corp. v. F.C.C., ___ U.S. App. D.C. ___, ___ E.2d ___, Case No. 17,785 et al., decided November 13, 1970. The sole guiding standard in the Communications Act as to how the choice among qualified applicants is to be made is "the public interest, convenience and necessity." See 47 U.S.C. 307, 308 and 309. In making a choice among applicants under the "public interest" standard, the Commission obviously has wide latitude

in determining what factors make for relevant distinctions. See Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956); WEBR, Inc. v. F.C.C., 136 U.S. App. D.C. 316, 420 F.2d 158 (1969).

1965 Policy Statement On Comparative Broadcast Hearings And The WHDH Decision.

Over the years the Commission has utilized different criteria in making selections between applicants, with one or more of these criteria waxing or waning in importance depending on the thinking of the Commission at the time.^{2/} Recognizing the need for "clarity and consistency of decision" and for simplifying the comparative hearing process, the Commission in 1965 adopted a statement of policy specifying the comparative criteria which it regarded as particularly significant and setting forth guidelines for the introduction of evidence in comparative cases. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965). The 1965 Policy Statement was made applicable only to comparative proceedings involving initial licensing, i.e., where two or more mutually exclusive applications are filed for an unoccupied frequency; and "[did] not attempt to deal with the somewhat different problem raised where an applicant is contesting with a licensee seeking renewal of license." 1 F.C.C. 2d at 393, note 1.

^{2/} For a critical review of the old comparative "criteria" in cases involving initial licenses see H. Friendly, The Federal Administrative Agencies (1962) pp. 53-73.

↓ So it
Continues
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*But not
conclusive*

In the few instances over the years in which a newcomer sought to displace an existing licensee the Commission has placed considerable weight on the existing licensee's performance, regarding a "proven record of dependability" as more persuasive than the promises and proposals of a newcomer. See Wabash Valley Broadcasting Corp., 35 F.C.C. 677 (1965); Hearst Radio, Inc., 15 F.C.C. 1149 (1951). Wall and Jacobs, Communications Act Amendments, 1952, 41 Georgetown L. J. 135, 166-168 (1953).

Recently, however, in WHDH, Inc., 16 F.C.C. 2d 1; 17 F.C.C. 2d 856 (1969), the Commission, in a decision which attached relatively little significance to the broadcast record of the incumbent, chose a newcomer over the existing operator principally on the grounds that the owners of the preferred applicant would be more actively involved in the station's operation and would provide a greater degree of diversity of control over media of mass communications in the area in view of the incumbent's connection with newspapers and AM and FM broadcast stations in the same community. See 16 F.C.C. 2d at 9-17, 19. On reconsideration the Commission made clear that WHDH, Inc. was sui generis since for reasons stemming from circumstances surrounding the original grant the existing licensee was "in a substantially different posture from the conventional applicant for renewal of broadcast license." 17 F.C.C. 2d at 872-873.

only 8 shallows
to Renewals
in entire year ?
- 7 -

1970 Policy Statement On Comparative Hearings
Involving Renewal Applicants.

As this Court observed in Greater Boston Television Corp. v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, Case No. 17,785 et al., considerable controversy and confusion was generated by the Commission's WHDH decision. The Commission's Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, supra, was designed to clarify the agency's policies in this area. (Slip Opinion, pp. 13-15, 24-26). At the outset the Commission observed that the statutory scheme of the Communications Act, 47 U.S.C. §§ 307, 308, 309, "calls for a limited license term" to permit "review of the broadcaster's stewardship at regular intervals to determine whether the public interest is being served; it also provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest." (J.A. 5). Two conflicting public interest considerations arise from this statutory scheme:

The first is that the public receive the benefits of the statutory spur inherent in the fact that there can be a challenge, and indeed, where the public interest so requires, that

What public interest is this?

the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation. (J.A. 5-6).

Bull A -

Stability and predictability were found to be necessary to "encourage good public service by a broadcaster" in view of the fact that "institution of a broadcast service requires a substantial investment, particularly in television." (J.A. 6).

Competitive threat is the way to assume good public service - remove it and the licensee will naturally promote forward meeting standards, whatever they happen to be

A balancing of the conflicting considerations, ^{ie public interest vs. Private benefit} the Commission observed, called for the following policies in comparative hearings involving regular renewal applicants:

... if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act--substantial service to the public--is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal. (Footnote omitted.)

What's not best possible service to public? Where do you get this substantial service? Cautious

If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the contrary,

if the competing new applicant establishes that he would substantially serve the public interest, he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest. (J.A. 6-7).

This was not a new policy, the Commission observed, but one that had been previously formulated in Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951), and applied in several other actions. (J.A. 6). The Commission did depart from WBAL in that evidence of improved service by existing stations following the filing of competing applications would be disregarded, where in WBAL it had been given decisional significance. The Commission explained that: "The renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon." (J.A. 8).

Regarding the applicability of its policy in favor of diversification of media of mass communication, which had been declared an important factor in the 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d at 394-395,^{3/} the Commission stated (J.A. 8-9):

^{3/} As already noted, the 1965 Policy Statement did not apply to comparative cases involving renewal applicants. 1 F.C.C. 2d at 393 n. 1.

What if
needs of
Community
& reduction
of concentration
becomes more
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originally issued

Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings. Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rulemaking proceedings. For example, FCC dockets Nos. 18110 and 18397. If any rulemaking proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and "best conduces to the proper dispatch of business and the ends of justice;" section 4(j) of the Communications Act; WJR v. F.C.C., 337 U.S. 265, 282 (1948). (J.A. 8-9). 4/

too Bad

4/ This is in accord with the view, expressed elsewhere by the Commission and cited with approval by this Court that "the renewal process is not an appropriate way to restructure the broadcast industry." See, e.g., Hale v. F.C.C., ___ U.S. App. D.C. ___, 425 F.2d 556 (1970).

But it is an appropriate way to serve the public interest by improving public service whenever possible.

If, however, the renewal applicant failed to substantially meet or serve the needs of his area, he would also face a demerit on diversification grounds. This demerit would probably be academic since "a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant." (J.A. 9 n. 4).

Changed
Having ~~clarified~~ its policies, to expedite the hearing process in this area, the Commission authorized presiding examiners to halt comparative hearings if the evidentiary record left no room for doubt that "the existing licensee's record of service to the public is a substantial one, without serious deficiencies."
^{5/}
(J.A. 9).

5/ Only one Commissioner (Johnson) dissented. He noted, however, that he did so reluctantly: "[T]he policy statement has been discussed by us calmly and at length. Each Commissioner has endeavored to balance the conflicting interests of broadcasters and public. The language has been revised in a spirit of accommodation; the public interest is better served as a result. Because of my participation in these drafting efforts I feel considerable inclination to concur. On agonizing balance, however, I find I cannot." (J.A. 11).

Because he participated in some of the Commission's worst decisions

aka 8

Refusal To Promulgate Rule Applying
1965 Policy Statement In All Comparative
Hearings.

On January 9, 1970, the Citizens Communications Center; Black Efforts for Soul in Television, Albert H. Kramer and William D. Wright (hereafter CCC and BEST) filed a petition for rulemaking. CCC and BEST, petitioners in Case No. 24,471, are associations formed for the purpose of promoting improved radio and television service that is responsive to local communities, and to increase participation of the black community in radio and television. Their petition for rulemaking, in essence, asked the Commission to adopt a rule codifying the 1965 Policy Statement on Comparative Broadcast Hearings, and to make it applicable to comparative hearings involving both new and renewal applicants. The text of their proposed rule incorporated most of the standards as well as most of the language used in the 1965 Policy Statement. Diversification of control of media of mass communication would have been declared a factor of primary significance.

On the same day that it adopted the Policy Statement regarding renewal cases, January 14, 1970, the Commission dismissed the petition for rulemaking (J.A. 15-17). It observed that the Policy Statement just issued did not change existing law, that the 1965 Policy Statement did not apply to renewal cases, that formal rulemaking procedures had not been followed in adopting the 1965 Policy Statement, and that this area was simply not conducive to a formal rule. (J.A. 15-16). The Commission also observed that:

[P]arties may seek revision of the policy as cases come before the Commission, and may do so in the context of specific factual situations. Interested persons, such as petitioners, may seek to present their views in such cases as amicus curiae. If the requested policy changes are rejected, resort may be had to the courts, if such rejection is believed unlawful, or to the Congress, if it is regarded as unsound policy. While, for all these reasons, we believe that further proceedings would not be helpful, it does serve the public interest to insure that our present policies, based largely on established precedents, are clearly stated. The policy statement does that. (J.A. 16-17).

For the reasons set forth in the 1970 Policy Statement the Commission rejected the merits of CCC and BEST's proposed rule. (J.A. 17).

Reconsideration Requests And Additional
Comments.

The Policy Statement was published in the Federal Register on January 21, 1970, 35 F. R. 822. Thereafter, CCC and BEST sought reconsideration and repeal of the Policy Statement as well as reconsideration of the dismissal of their petition for rulemaking. Reconsideration was also sought by Hampton Roads and Community Broadcasting, petitioners in Case No. 24,491, two applicants for television channels in competition with renewal applicants in Norfolk, Virginia and Boston, Massachusetts. On March 2, 1970, the Commission released an Order, FCC 70-209, consolidating these requests for consideration, and "[I]n view of the bulk of the aforementioned pleadings and the significance of the issues involved, interested persons" were given additional time for filing responsive and reply pleadings. This Order was also published in the Federal Register, 35 F. R. 4348-4349 (March 11, 1970).

After receiving opposing, and reply comments, the Commission on July 21, 1970, denied reconsideration. 24 F.C.C. 2d 383, J.A. 18-21. It again emphasized that the 1970 Policy Statement was not a rule and was not intended to have the binding effect of a rule. (J.A. 19). It reiterated

But nevertheless, might as well be a rule

that "parties are always free to argue, in a hearing that a policy should be changed, or shall be applied differently because of their particular situation . . ." Accordingly, the Commission rejected the claim that it had violated the APA's notice requirements for rulemaking proceedings since "general statements of policy" are specifically exempt from the notice provision. 5 U.S.C. 553(b). (J.A. 19). Petitioners had simply missed the point that the Commission had only issued "a policy statement--subject to full reargument in individual cases." (J.A. 19). Nevertheless, the Commission still carefully considered their criticisms of the Policy Statement before concluding "we are not convinced that our announced policy on comparative renewal proceedings is either illegal or unwise." (J.A. 19-21).

Disagreeing with this conclusion, CCC and BEST in Case No. 24,471, and Hampton Roads and Community Broadcasting in Case No. 24,491 seek review pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342.

ARGUMENT

As this Court recently observed, the Commission's 1970 Policy Statement concerning comparative hearings involving renewal applicants was designed to eliminate confusion and controversy generated by the WHDH decision which, to some,

"seemed to be a Commission policy, reversing Hearst" and placing "all license holders on equal footing with new applicants every time their three year license came up for renewal."

Greater Boston Television Corp. v. F.C.C., supra, S. Op. p. 13.

X Intended as a counterpart to the 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, this Commission pronouncement discussed the applicability of various comparative criteria to contests between renewal applicants and newcomers seeking the same facilities. Its avowed purpose is to "contribute to clarity of our policies" so as to assist hearing examiners in deciding such cases; expedite the hearing process; promote consistency in agency decisions; and inform the broadcast industry and the public of the applicable decisional standards. (J.A. 5-14).

Review is sought by petitioners CCC and BEST,

with the effect of suppressing competition in license applications

and by petitioners Hampton Roads and Community Broadcasting, who have filed applications which are mutually exclusive with two renewal applications. In the first part of our argument we will show that the Commission's Policy Statement did not result in a final or reviewable order since the statement does not impose any obligation, deny any right, or fix any legal obligations. It merely sets forth general guidelines and policies which may be implemented in future evidentiary hearings involving mutually exclusive applications. Should this Court decide to reach the merits of the petitions for review, we will show in the remaining sections of our argument that there is no merit to petitioners' procedural and substantive objections to the Policy Statement.

I. THE COMMISSION'S POLICY STATEMENT IS NOT A FINAL ORDER; NOR IS IT RIPE FOR REVIEW AT THE PRESENT TIME.

On numerous occasions this Court has held that Congress has conferred jurisdiction upon it "to review only final orders of the Federal Communications Commission." Bethesda-Chevy Chase Broadcasters, Inc. v. F.C.C., 128 U.S. App. D.C. 85, 385 F.2d 967 (1967); Southland Industries v. F.C.C., 69 U.S. App. D.C. 82, 99 F.2d 117 (1938). See also Meredith Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 379, 365 F.2d 912

(1966): Mvers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, (1938); Lamb v. Hyde, 96 U.S. App. D.C. 181, 223 F.2d 646 (1955). To be final an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948); Isbrandsten v. United States, 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990 (1954). The Policy Statement, which simply promulgates guidelines for use in a certain type of comparative hearing, plainly does none of these things. In response to petitioners' request for reconsideration, the Commission made clear that the Policy Statement is not intended to have the binding effect of a formal rule, but it is "subject to full reargument in individual cases" (J.A. 19) in light of the factual record developed in each comparative proceeding. It therefore does not finally impose any obligation, deny a right nor does it fix any legal obligation. Evidentiary hearings must still be held in which the policy outlined in the Statement may or may not be applicable, and any party aggrieved by the outcome may of course obtain review in the usual course.

What will happen when a finding of "substantial attenuation" is made in any particular hearing?

Thus, for example, Hampton Roads and Community Broadcasting have filed mutually exclusive applications conflicting with renewal applicants and are now engaged in a comparative hearing. They, like the petitioner in Bethesda-Chevy Chase, supra, claim that prehearing changes have been made (by the Policy Statement) which deprive them of the substantive right to a comparative hearing. That case's holding is squarely applicable here: The consolidated hearings on the merits of the mutually exclusive applications of petitioners and the renewal applicants have not yet been completed. If petitioners ultimately prevail on the merits, the alleged changes would not be prejudicial. If petitioners should not prevail, they have a right to appeal to this Court conferred by 47 U.S.C. 402(b)(1).^{6/} But in the present posture of the case, the request for review by Hampton Roads and Community Broadcasting is clearly "at war with the long settled rule of judicial administration that no one is

^{6/} Commission records indicate that approximately ten cases (AM, FM, and TV) involving comparative hearings between newcomers and incumbent licensees are presently in progress. Four involve applications filed prior to the WHDH decision and six were filed subsequently. Initial Decisions have been issued in two of the cases; exceptions are now pending before the Commission.

entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Brandywine-Main Line Radio, Inc. v. F.C.C., Case No. 20,788, Order of the Court filed May 18, 1967, cert. denied, 389 U.S. 974 (1967).

CCC and BEST, the other petitioners, state that their interest in the case stems from their desire to improve broadcast service to local communities in general and to the black community in particular. Before the Commission they expressed the belief that their objectives can best be accomplished if standards set out in the Commission's WHDH decision, and the 1965 Policy Statement, are applied in all comparative proceedings, including those involving regular renewal applicants. There are, however, several comparative renewal hearings now pending which involve applicants supported by CCC and BEST. The Commission made clear that they could participate in the hearings as amicus curiae and urge their views as to the weight which should be given the various evidentiary showings (J.A. 16). The Commission's rules also provide for intervention by parties in interest as well as by others whose participation would "assist the Commission in the determination of the issues in question." 47 CFR 1.223.

If petitioners do not prevail before the Commission and are adversely affected by the outcome, they can of course appeal to this Court when the agency issues its decision in those cases. See 47 U.S.C. 402(b)(6).

In sum the Commission's Policy Statement does not represent the culmination of the administrative process but the beginning. Moreover the tentative nature of its provisions establish beyond question that ~~no obligations of the petitioners have been fixed or their rights denied~~. Thus it has none of the attributes of a final order.

Apart from this, however, it would seem clear from the foregoing that review of the Policy Statement at this time would be premature. Both the Supreme Court and this Court have recently reiterated that a relevant consideration in determining reviewability is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication. . . ." Marine Terminal v. Rederi Transatlantic, __ U.S. __, December 8, 1970; Medical Committee for Human Rights v. SEC, D.C. Cir. Case No. 23,105, July 8, 1970, S. Op. p. 13. "[The] doctrine of ripeness often precludes immediate judicial consideration even in cases when judicial consideration seems well nigh inevitable; in such cases the doctrine operates

Maybe applicable here

to provide review later rather than earlier, and to assure review in a more concrete, focused context, on a more complete record." Hinton v. Udall, 124 U.S. App. D.C. 283, 287, 304 F.2d 676, 680 (1966). This principle would seem to be especially applicable here where the agency has simply attempted to clarify the policies which will guide future comparative hearings and where the agency has indicated that petitioners are free to argue in the hearing that the policies should be changed or should not be applied because of their particular factual situation. Here, as already indicated, a number of such hearings are in progress. Several are nearing completion; others are in their initial stages. *It is highly likely that at least some of the decisions in these proceedings will be appealed to this Court.* Application of the doctrine of ripeness in this case would assure that review will ultimately take place "in a more concrete, focused context, on a more complete record." See also Toilet Goods Ass. v. Gardner, 387 U.S. 158, 164-166 (1967). *pending*

At the same time a refusal to review the Policy Statement at this time imposes no hardship on petitioners. CCC and BEST are not directly affected by the Statement at all. Hampton Roads and Community are presently in hearings, but if and how the Statement will affect their application are matters not yet known. Neither party has "been harmed or

threatened with immediate harm"^{7/} by the Commission's pronouncement.^{8/} Under these circumstances this Court has consistently rejected as premature requests for judicial review of agency action. Hinton v. Udall, supra; Danville Tobacco Ass'n. v. Freeman, supra; Meredith Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 374, 365 F.2d 912 (1966);^{9/} Alaska Airlines, Inc. v. Pan American World Airways, Inc., 116 U.S. App. D.C. 128, 321 F.2d 394 (1963).

This is not a case like United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), where the impact of the multiple ownership rules could occur at any time through purchases or sale of Storer's stock. Petitioners are not

^{7/} Danville Tobacco Ass'n. v. Freeman, 122 U.S. App. D.C. 145, 316, 351 F.2d 832, 833 (1965).

^{8/} Their situation is in practical effect no different from one in which an applicant seeks review of a hearing order on the grounds that the issues should be modified. Like such a person, these petitioners have not yet exhausted their administrative remedies. Indeed had the Commission issued no Policy Statement at all but embodied the same concepts in various individual hearing orders there can be no doubt that the Court would refuse to entertain an appeal prior to completion of the proceeding.

^{9/} In Meredith the Commission had issued a policy statement to the effect that an evidentiary hearing on the question of concentration of control over mass media would be required where an applicant who owned a VHF television station in one of the top fifty markets sought to acquire an additional station in another such market. The Court rejected Meredith's contention that such a policy directly affected its interests (Meredith owned several stations in such markets) and held that its challenge to the policy statement was premature.

subject to any civil or criminal sanction as in Frozen Food Express v. United States, 351 U.S. 41 (1956); nor is there any immediate interference with contractual obligations as there was in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942). Significantly, in CBS, the Court observed that an adverse effect which would arise "only on the contingency of future administrative action" would not be sufficient to warrant review. 316 U.S. at 423. And as this Court observed in California-Oregon Power Co. v. F.P.C., 99 U.S. App. D.C. 263, 270, 239 F.2d 426, 433 (1956), "In all cases held reviewable, something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something." Therefore, rules and policy statements to be applied in future licensing actions have been held not to aggrieve a petitioner since adverse effects "depend upon future administrative action." Aircoach Transport Ass'n. v. C.A.B., 103 U.S. App. D.C. 107, 109, 255 F.2d 185, 187 (1958); Meredith Broadcasting Co. v. F.C.C., supra. See also Toilet Goods Ass. v. Gardner, 387 U.S. at 164-166.

For all of the foregoing reasons, the petitions for review should be dismissed.

II. THE COMMISSION'S CONCLUSION THAT A RENEWAL APPLICANT'S RECORD OF SUBSTANTIAL SERVICE TO THE PUBLIC OVERBALANCES OTHER COMPARATIVE FACTORS DOES NOT VIOLATE THE REQUIREMENTS OF ASHBACKER, THE FIRST AMENDMENT, OR EQUAL PROTECTION.

In its 1970 Policy Statement the Commission indicated that a record of substantial public service unblemished by serious deficiencies overbalances other comparative factors including diversification of media of mass communications. While a preference for diversification of control of media of mass communication is ordinarily awarded by the Commission in comparative cases involving new applicants (Allied Broadcast Corp. v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, Case No. 23,423, decided June 29, 1970; Greater Boston Television Corp. v. F.C.C., supra, S. Op. pp. 36-37), in the 1970 Policy Statement the Commission indicated that this preference cannot be considered decisional in a renewal case where a licensee has rendered substantial public service without serious deficiencies. Of course, if such a renewal applicant has not rendered substantial service he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself,

against the renewal applicant." (J.A. 9 n. 4). The Commission explained that "[w]here a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings." (J.A. 8-9). In cases involving undue concentration of control, abusive conduct such as predatory or anticompetitive practices, special disqualifying issues would still be designated for hearing. See, e.g., Midwest Television, Inc., 16 F.C.C. 2d 943 (1969); Chronicle Broadcasting Co., 16 F.C.C. 2d 882 (1969); Frontier Broadcasting Co., 21 F.C.C. 2d 570 (1970). And, in fact, an anticompetitive issue was designated against the renewal applicant which is mutually exclusive with one of the petitioners here. RKO General, Inc. (WNAC-TV), 20 F.C.C. 2d 846 at 849 (1969).

Petitioners had urged the Commission to adopt a rule that gave substantial weight to the diversification criterion as it had in the WHDH case, supra. They now argue that the Commission's Policy Statement (1) deprives a

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qualified new applicant of his right to a comparative hearing under the Communications Act as interpreted in Ashbacker v. F.C.C., 326 U.S. 327 (1945) and (2) restricts or chills the exercise of First Amendment rights and deprives any emerging minority groups of equal protection of the laws.

1. To support their claim that the Communications Act, as construed in Ashbacker, is violated by the Policy Statement, petitioners argue that a conclusive presumption is created in favor of renewal applicants which dispenses with proof and precludes comparative hearings. (CCC Br.24). They also argue that the Commission made substantial changes in the procedures followed in Hearst, and that the standard of substantial past performance or service is too vague and indefinite to be a basis for preferring the renewal applicant in a comparative hearing. (Hampton Br. 16-26). We will show that the holding of Ashbacker does not reach the question presented by the adoption of the Policy Statement, and that the relevant authorities support the approach taken by the Commission.

(a) Section 309 of the Communications Act provides that if the Commission is unable for any reason to find that the grant of an application is consistent with the "public interest, convenience, and necessity" standard, it shall designate the application for a full hearing. This hearing requirement has been in the Communications Act since its inception. In Ashbacker the Commission, faced with two mutually exclusive applications for the same frequency, granted one of the applications in reliance upon its authority to make grants without hearing where they are consistent with the public interest. The other application was set for hearing to determine, among other things, the extent of interference from simultaneous operation of the two stations, upon a notice advising that it would not be granted unless the issues were determined in its favor. The Court noted that the complaining party was given a burden it could not meet and that a hearing designed as one for an available frequency became in substance one for the revocation or modification of an outstanding license. It held that "where two bona fide applications are

mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." (326 U.S. at 333.)

Significantly, the Court indicated that it was not concerned with the merits, but only with a matter of procedure. And its holding that the right to a hearing conferred by the statute required a hearing prior to the grant of a mutually exclusive application did not establish what factors should be examined in the hearing or whether it is permissible in a renewal hearing to accord decisional significance to a factor found by the Commission to be of crucial importance. Indeed,

** {* Ashbacker recognized that in renewal proceedings a new applicant was under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332.

As previously noted, the Policy Statement has not yet been applied in any final comparative decision. The Commission has merely set out its judgment that a record of "substantial service to the public," unblemished by serious deficiencies, overbalances other comparative factors such as promises of superior performance by a new applicant, diversification or integration of ownership and management. As an abstract proposition, this judgment has not been shown to be unreasonable or contrary to the public interest standard. In fact, most of the comparative factors were designed to insure that the

to what?

But at least he could make the comparative showing under the new policy it is irrelevant

not merely substantial service

- 30 -

public received the best possible broadcast service. Moreover, a party to a comparative hearing will be permitted to show that in a particular factual context the Policy Statement should not be applied or should be modified.

The task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one, and in making a choice among qualified applicants, "Two diametrically opposite schools of thought in respect to the public welfare may both be rational; * * * All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term." Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 238, 230 F.2d 204, 206, cert. den. 350 U.S. 1007 (1956). The Commission's view that, on balance, a past record of substantial service to the listening or viewing public should be the determinative factor upon renewal as against a new competitor is clearly reasonable and not forbidden by anything in the Communications Act. This policy, the Commission emphasized, is based upon its view of the best way to achieve good public service, and not, as petitioners claim, any notion that the existing licensee has a right to a further license because of his previous use of the frequency. (J.A. 20-21).

(b) The view enunciated in the Policy Statement is not new; see e.g., Hearst Radio Inc. (WBAL), 15 F.C.C. 1149 (1951), and Wabash Valley Broadcasting Corp., 35 F.C.C. 677 (1963). It

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is not a distinguishing feature, as petitioners urge, that evidence was taken on all comparative factors in Hearst. What is important is not what evidence was admitted into the record but the manner in which it was weighed. The Policy Statement does not represent a radical departure from the policy enunciated in Hearst. In Greater Boston Television, supra, WHDH had placed substantial reliance on Hearst in seeking reversal of the Commission's decision. In agreeing that WHDH fell into a special and unique category because of its past history, this Court inter alia relied on the 1970 Policy Statement, which it found "in essence carries forward the general policy on renewals expressed in Hearst." S. Op. 25.

It should also be noted that CCC and BEST, albeit reluctantly, acknowledge (Br. 7-9) that a 1952 amendment to the Communications Act, while not eliminating the need for comparative hearings in cases involving renewal applicants, ratified the earlier Commission rulings giving decisional weight to a renewal applicant's past broadcast record. See also Wall and Jacobs, Communications Act Amendments, 41 Georgetown L. J. 135, 166-168 (1952). ^{10/}

^{10/} Under the same public interest standard of the Radio Act of 1927, in a case where the Commission refused to delete two existing stations which had been rendering meritorious service in favor of an applicant seeking to move to their frequency, this Court stated that:

It is not consistent with true public convenience, interest, or necessity, that meritorious stations . . . should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest, and necessity are the paramount considerations.

Chicago Federation of Labor v. F.R.C., 59 App. D.C. 333, 334, 41 F.2d 422, 423 (1930). (Footnote Con't)

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As this Court recently explained, the "expectancies" of a renewal applicant "are provided, in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security."

Greater Boston Television Corp., supra, 3 Op. p. 33. See also The FCC And Broadcast License Renewal, 36 U. of Chi. L.R. 854, at 870 n. 96 (1969).

It is also noteworthy that Judge Friendly, while criticizing the "criteria" applied in comparative broadcast cases involving initial licensing, observed that "Although Hearst's lack of local affiliation might have been a reasonable basis for denial of the original grant, refusal to renew on this ground after a period of satisfactory community service would indeed have been shocking." H. Friendly, The Federal Administrative Agencies, 1962, p. 62. Other commentators have expressed similar views. See e.g., Wall and Jacobs, supra; Jaffee, WHDH: The FCC and Broadcasting Renewals, 82 Harv. L. Rev. 1693, 1700 (1969); see also Goldin, The Aftermath of WHDH in FCC License Renewal Policy, 83 Harv. L. R. 1014, 1023 (1970), which discusses the Hearst case, and concludes that the 1970 Policy Statement reflects an improvement over that doctrine since "the incumbent must stand or fall on the basis of his record in the last license term."

10/ (Footnote Con't)

To the same effect is Evangelical Lutheran Synod v. F.C.C., 70 App. D.C. 270, 105 F.2d 793 (1939); Yankee Network, Inc. v. F.C.C., 71 App. D.C. 11, 22, 107 F.2d 212, 213 (1939); and in Journal Company v. F.R.C., 60 App. D.C. 92, 94, 48 F.2d 461, 463 (1931), this Court observed that "[w]here a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons."

All of these cases were brought to the attention of the Supreme Court in Ashbacker, supra, Brief for Petitioner, pp. 7, 8, and 13, which in its opinion recognized that as a practical matter a greater burden rested "on a newcomer seeking to displace an established licensee." 326 U.S. at 332.

yes but newcomer can't be foreclosed

(c) There is no substance to the argument that the Commission has established a conclusive presumption which dispenses with proof. The Policy Statement provides that at the comparative hearing "the renewal applicant would have a full opportunity to establish that his operation was a 'substantial' one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position." At the hearing the competing applicant "would have the same opportunity in the hearing process to demonstrate his allegation, that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case." (J.A. 7).

(d) Similarly, there is no merit to the claim that the standard which a renewal applicant must meet to be awarded a preference in a comparative hearing is too vague and indefinite. The renewal applicant must show that "its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies." (J.A. 6). It is suggested by the petitioners that there are no objective standards for judging substantial performance. The Commission is considering the issuance of a notice of inquiry to explore whether standards can be adopted defining what constitutes substantial service by renewal applicants. For the present, however, there is considerable agreement on the major

program categories usually necessary to meet public interest, needs and desires of a station's audience. These categories were identified in the Commission's Programming Policy Statement, 25 F. R. 7291, 7295, 20 Pike & Fischer, R.R. 1901, 1913 (1960). And the Commission has proposed a Primer on Ascertainment of Community Problems by Applicants, 20 F.C.C. 2d 880 (1970), which would codify many of the standards which have been evolved in adjudicatory cases. See also The FCC And Broadcast License Renewals, 36 U. of Chi. L. R. 854, 858-859 nn. 19-25 (1969).

But proposed changes will be irrelevant

In the 1970 Policy Statement the Commission pointed out that vital to the judgment would be the programming performance of the renewal applicant "in all programming categories," including response to "ascertained community needs and problems." (J.A. 7). It also identified many of the practices which are deemed "serious deficiencies" in a broadcast operation including rigged quizzes, violations of the fairness doctrine, overcommercialization, broadcast of lotteries, violation of the rules against racial discrimination, and fraudulent advertising practices. (J.A. 7). The Commission recognized that its Policy Statement "does not work with mathematical precision, and that particular factual circumstances will have to be explored in the hearing process." (JA.7). But as was pointed out in Edwin R. Fischer v. F.C.C., 135 U.S. App. D.C. 134, 137, 417 F.2d 551, 555 (1969), in which a similar policy statement was under review, "True, the statement indicates flexibility, but it is intended to state a policy, not a formula."

2. To support their argument that the Policy Statement violates First Amendment rights, and equal protection, petitioners assert that broadcast licensees exercise virtually unfettered discretion over programming; that access can only be obtained by ownership of broadcast licenses, and that the First Amendment therefore mandates that diversification of mass media be considered a factor under the public interest standard. CCC and BEST also urge that because black groups own only a small percentage of broadcast facilities minority groups therefore have little opportunity to have programming on "white owned" local stations which reflects their point of view, or serves their needs and interests. The Policy Statement, according to CCC and BEST, threatens to stifle efforts by back groups to obtain broadcast facilities and is therefore discriminatory and in violation of equal protection of the laws.

These arguments are based on a misunderstanding not only of the Commission's 1970 Policy Statement but of the requirements of the fairness doctrine, which was upheld in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). They ignore the fact that "service to minority groups" is an essential element of substantial service to the public.

Before a renewal applicant can obtain a preference he must show that he has provided substantial service to the public unblemished by serious deficiencies. Adherence to the fairness doctrine is a sine qua non for a licensee seeking renewal. United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 343, 359 F.2d 994, 1009(1966). Moreover, the Commission has indicated that failure to comply with the fairness doctrine is one of the serious deficiencies which would prevent a renewal applicant from obtaining a preference under the Policy Statement. Contrary to petitioners' belief a licensee does not have virtual unfettered discretion under the fairness doctrine. As the Commission pointed out in its 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949), and as the Supreme Court emphasized in Red Lion, this doctrine is designed to insure that "people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." 395 U.S. at 390. A broadcaster must act as a public trustee and must operate his station in accordance with "the right of the public to receive suitable access to social, political,

But, Comm's didn't seem to understand that in that very case

esthetic, moral, and other ideas and experiences." 395
U.S. at 390.

Petitioners Hampton Roads and Community assert (Br. 29-33) that the First Amendment, as interpreted in Red Lion, mandates diversification of broadcast ownership. However, as this Court observed in rejecting WHDH's contention that Red Lion has eliminated the need for the diversity criterion of the 1965 Policy Statement, "The point is more soundly put by saying that the importance of avoiding concentration of control in communication is such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment. Philadelphia TV Broadcasting Co. v. FCC, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966)." Greater Boston Television Corp. v. F.C.C., supra, S. Op. pp. 36-37. See also H. Friendly, The Federal Administrative Agencies (1962) pp. 68-70. Here the Commission explained in some detail (page 10, supra, J.A. 8-9) why it would not be fair or in the public interest to consider the diversity criterion decisional where the renewal applicant has provided substantial service to his audience.

Service to minority groups is one of the essential elements necessary to satisfy the interests, needs and

desires of the public served by a broadcast facility. See the Commission's 1960 Programming Policy Statement, supra; Nondiscrimination Employment Practices Of Broadcast Licensees, 33 F. R. 9960, 13 F.C.C. 2d 766, para. 10 (1968); and 47 CFR 73.125.^{11/} And the 1970 Policy Statement clearly establishes that failure to operate in accordance with the fairness doctrine, failure to meet the needs and interests of the service area by not providing service to minority groups, or violation of the rules prohibiting racial discrimination, are all serious deficiencies in a broadcast operation. A renewal applicant with such deficiencies would not receive a comparative preference; on the contrary, he would receive a demerit which would probably be determinative, without a demerit on diversification. Simply stated, the Policy Statement tells a broadcaster that "if you do a solid job as a public trustee of this frequency, you will be renewed; your future is thus really in your hands." And it tells all interested persons, "the Act seeks to promote not just minimal service but solid,

Not the best, you can't get by

^{11/} Licensees have also been encouraged by the Commission to meet with community groups, including black and other minority representatives, to settle complaints about deficiencies in local broadcast service. It has expressed the view that "such cooperation at the community level should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission." KCMC, Inc., 19 F.C.C. 2d 109 (1969). Negotiations similar to those approved in KCMC have taken place, or are taking place in Atlanta, Georgia, Memphis, Tennessee, Nashville, Tennessee, and Chicago, Illinois.

substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application and will be afforded the opportunity, in a hearing, to establish your case. If you do so, you will be granted authority to operate on the frequency in place of the renewal applicant who has failed to provide substantial service." (J.A. 9).

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Correctly understood, the 1970 Policy Statement does not restrict or chill the exercise of First Amendment rights, nor does it interfere with the rights of minority groups to replace broadcasters who have failed to provide substantial public service for their entire audience. A nearly unanimous Commission ^{12/} has expressed the belief that this is the best possible balancing of the conflicting public interest considerations and that, if conscientiously implemented, this policy will improve public service for all. It has pledged to do its part and has called upon the broadcast industry and the interested public to play their vital roles in the implementation of this policy. (J.A. 11).

12/ Only one Commissioner dissented (J.A. 11-14) and even he acknowledged that "the public now clearly understands that a new day has dawned; licenses will not be automatically renewed; those licensees not offering substantial service are open to challenge. The below-average broadcasters should respond to this new state of affairs by upgrading their programming from a minimal to a substantial performance. They now have a very real incentive to purchase this renewal insurance against the possibility of a challenge." (J.A. 13). See also Goldin, The Aftermath Of WHDH In FCC License Renewal Policy, 83 Harv. L. Rev. at 1023.

III. THE COMMISSION DID NOT EXCEED OR ABUSE ITS
AUTHORITY WHEN IT ISSUED A POLICY STATEMENT
INSTEAD OF PROMULGATING THE FORMAL RULE
PROPOSED BY PETITIONERS.

Cite. Petitioners assert that in adopting the Policy Statement the Commission exceeded its authority and violated the rulemaking procedures prescribed by Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. (CCC Br. 30-31; Hampton Roads Br. 33-43). However, this Court has previously upheld the Commission's authority to adopt policy statements which set forth policies and guidelines which will govern evidentiary hearings. And under the circumstances of this case, the Commission plainly did not err when it rejected petitioners' contention that it should conduct the formal rulemaking proceedings prescribed by Section 4.

Congress has conferred upon the Commission broad authority to fashion procedures for the exercise of its many duties. Section 4(j) of the Communications Act, 47 U.S.C. 154(j), empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The Supreme Court has interpreted this provision as "explicitly and by implication [leaving] to the Commission's own devising" the "subordinate questions of procedure * * * [such as] the scope

of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions * * *." F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). In F.C.C. v. WJR, 337 U.S. 265, 282 (1949) the Court observed that the Act "left largely to [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate [the ends of justice]." This sweeping authorization was recently reaffirmed in F.C.C. v. Schreiber, 381 U.S. 279, 289 (1965).

Adoption of a policy statement was found by the Commission to be especially appropriate in the present context:

The area is simply not conducive to rulemaking. Rather, we have found it most appropriate to develop policies in ad hoc decisions, to clarify and refine such developments with an overall policy statement on appropriate occasions, and to stress the crucial importance of applying these policies to the particular facts of each case. (J.A. 16).

A similar conclusion had been reached earlier in 1965 when the Commission adopted the Policy Statement on Comparative Hearings Applicable to New Applications, 1 F.C.C. 2d at 393-395, 399.

While petitioners urged the Commission to adopt a formal rule in this area, the text of their proposed rule

largely incorporated the language and standards set out in the 1965 Policy Statement. As the Commission observed, "the rule proposed by petitioners is like no rule adopted or proposed in our very extensive regulations. Such a general discussion of policies is not, in our judgment, effective rulemaking." (J.A. 16). Plainly, the Commission's decision to proceed as it did, rather than to adopt a formal rule, is a matter within the discretion conferred by 47 U.S.C. 154(j) as construed in the above cases.

Petitioners argue, however, that regardless of the label placed on the Commission's action, it constituted substantive rulemaking and was therefore defective in that there was no notice or opportunity to be heard as required by Section 4 of the Administrative Procedure Act. No case authority is cited in support of this claim and it is plainly at odds with the A.P.A. and with decisions of this Court. A general policy statement is "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." See Attorney General's Manual on the Administrative Procedure Act, p. 30 (1947). See also Final Report of the Attorney General's Committee on Administrative Procedure, 79th Cong., 1st Sess., pp. 26-27 (1941) which explains the difference between "statements of general policy" and "substantive regulations." This Report formed the basis for proceedings which led to the adoption of the A.P.A. Statements of general policy

were specifically exempted from the notice and hearing requirements of the rulemaking section of the A.P.A. 5 U.S.C. 553(b) (A)

("This subsection does not apply to . . . general statements of policy . . ."). And Professor Davis has observed that:

Policy statements are usually looser than rules and are not necessarily binding on the agency, as legislative rules may be. Policy statements may still be very helpful. Such a statement may be appropriate when the agency feels that it is not quite prepared to issue rules; the agency may say, in effect: We are feeling our way in this direction, and this is where we want to go if we can get there. A policy statement may be essentially an announcement of a plan for an area of the agency's activities and therefore may be very helpful in structuring discretion. In general, policy statements should be used much more freely. K. C. Davis, Discretionary Justice, a Preliminary Inquiry, p. 102 (1969).

This we submit describes precisely what the Commission undertook to accomplish in the action under review.

It is argued, however, that the Policy Statement represents a new departure for the agency and thus required notice and opportunity to be heard before it could properly be adopted. We do not agree that "new" policy necessarily requires notice and an opportunity to be heard before it can be adopted. But as already demonstrated (pp. 30-32, supra), the thrust of the principles enunciated was not to establish new policy but to reiterate the Commission's adherence to a

continuation of the policies of Hearst Radio, Inc., supra. The Court has agreed with this interpretation stating that "in essence [the Policy Statement] carries forward the general policy on renewals expressed in Hearst." Greater Boston Television Corporation v. F.C.C., supra.^{13/} It is true, as petitioners point out, that under the Policy Statement if a hearing examiner is satisfied that evidence adduced shows that the program service of the incumbent has been substantially attuned to the needs of the area, he may in his discretion halt the proceeding and issue a decision. While this may differ from the procedure followed in the Hearst case itself, it is a logical application of the Hearst doctrine, since if substantial service can be dispositive, there is no need to lengthen the hearing record with evidence as to other matters. Moreover, it is plainly a procedural rather than a substantive proviso, so that even if it assumed the form of a rule--which it does not--it could have been adopted without formal rulemaking proceedings.

Kessler v. F.C.C., 117 U.S. App. D.C. 130, 136-139, 326

^{13/} Petitioners Hampton Roads and Community filed an amicus brief in Greater Boston stating that they were challenging the Policy Statement on the ground inter alia that the rulemaking requirements of the Administrative Procedure Act had not been followed and urged the Court not to address itself to the Policy Statement. WHDH, on the other hand, placed "substantial reliance" on Hearst and the Policy Statement, in seeking reversal of the Commission decision denying its renewal application. Greater Boston Television Corp., supra, S. Op. p. 25.

Why?
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Substantive
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all other
factors

F.2d 673, 680-682 (1963). It is noteworthy in this connection that the Commission stressed the tentative nature of the examiner's authority by providing that the procedure should be followed only where there is "no doubt that the existing licensee's record of service is a substantial one" (emphasis added), and that "where the matter is in any way close . . . it would be more appropriate to proceed with the hearing . . . and thus assure that the record is complete" (J.A. 9).^{14/} The argument that such a narrow delegation of authority, to make what is in effect an evidentiary ruling, requires public notice and an opportunity to be heard is, we submit, singularly unpersuasive. Moreover, in any case a new applicant may argue that the policy should not be applied, and advance any grounds he wishes in support of the argument. The Commission's disposition of any such argument would of course have to stand the test of reasonableness in light of the particular showing made.

^{14/} Significantly, in RKO General, Inc., WNAC-TV, Docket No. 18754, May 25, 1970, cited by petitioners, the examiner who will preside at the hearing (which involves the application of petitioner Community Broadcasting of Boston and intervenor Dudley), ruled at the first prehearing conference that he would proceed with evidence under all the issues, including the comparative showing of the parties. (Tr. 26-27). This ruling was subsequently cited with approval by the Review Board. 24 F.C.C. 2d 252, 253 (1970).

The same procedures now challenged by petitioners were used by the Commission when it adopted the 1965 Policy Statement on Comparative Hearings, which petitioners asked the Commission to extend to comparative hearings involving renewal applicants. Similar procedures were used in adopting the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1960). This latter was attacked in a subsequent appeal on the same ground relied on here, that it was in reality a substantive rule that had been adopted without the formal rulemaking procedures prescribed by Section 4 of the A.P.A. This Court squarely rejected the claim finding that the Commission had "merely set out a general policy and guidelines to govern future hearings . . .," precisely what the present action accomplishes. Edwin R. Fischer v. F.C.C., 135 U.S. App. D.C. 134, 417 F.2d 551 (1969).

The same argument was also rejected in Meredith Broadcasting Co. v. F.C.C., supra, where it was contended that a Commission policy statement governing the procedures it would follow with regard to certain classes of applications for consent to transfer broadcast licenses had an important substantive effect on the conduct of petitioner's affairs

and should therefore have been the subject of a rulemaking proceeding.^{15/}

Finally, in John F. Banzhaf, III v. F.C.C. and U.S.A., 132 U.S. App. D.C. 14, 405 F.2d 1082, cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969), a case in which the Commission adopted an order that indeed had the effect of a substantive rule, the Court rejected arguments that it was void because of procedural irregularities:

The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights.

But here
Comm applied
policy retroactively

The same thing has occurred here. After the Policy Statement had been published in the Federal Register, petitioners filed requests for rehearing. Because of the substantial length of these pleadings and because of the significance of the issues involved, interested persons were given additional time for filing responsive and reply pleadings. As previously noted this order was published in the Federal Register. After

^{15/} See also Gibson Wine Co., Inc. v. Snyder, 90 U.S. App. D.C. 135, 137-138, 194 F.2d 329, 3410342 (1952) holding that notice and hearing requirements do not apply to an "interpretative rule" and discussing the nature of substantive regulations; also Kessler v. F.C.C., supra, 117 U.S. App. D.C. at 136-139, 326 F.2d at 680-682.

receiving opposing and reply comments the Commission issued an opinion dealing with the objections to the Policy Statement and its refusal to institute rulemaking proceedings. Moreover, unlike Banzhaf, affected parties here will have a full opportunity to show in the comparative hearing that the ground rules specified in the Policy Statement should not be applied to their particular case.

In sum, the Policy Statement was precisely that, an articulation of guidelines to be followed in deciding a certain type of comparative hearing. There is no basis for the claim that it represents substantive rulemaking to which the notice and public hearing requirements of the Administrative Procedure Act apply. CCC and BEST brought their views to the Commission's attention prior to the issuance of the Policy Statement in their petition for rulemaking. Thereafter, all petitioners and other interested persons had an opportunity to bring their views to the Commission's attention when it acted on the requests for reconsideration. The Commission also "had the benefit of recent extensive legislative proceedings in which a large number of interested persons

set forth their view on this specific area" (J.A. 16).^{16/}

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The Policy Statement represents, not an abuse of discretion, as petitioners contend, but the type of structuring of broad administrative discretion encouraged by Professor Davis. See K. C. Davis, Discretionary Justice, pp. 97-99, 102, 226 (1969).

CONCLUSION

Accordingly, the petitions for review should be dismissed. Should this Court conclude that the Policy Statement is a final order and is ripe for review, the Commission's Policy Statement should be affirmed.

Respectfully submitted,

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January 21, 1971.

^{16/} Hearings before Communications Subcommittee on S. 2004, To Amend the Communications Act of 1934 to Establish Orderly Procedures for the Consideration of Applications for Renewal of Broadcast Licenses, 91st Cong., 1st Sess., August 5-7, December 1-5, 1969.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

3/15/71 PM
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 8 1971

No. 24,221

Nathan J. Paulson
CLERK

Citizens Communications Center, et al., Appellants

v.

Honorable Dean Burch, Chairman Federal Communications
Commission, et al., Appellees

No. 24,471

Citizens Communications Center, Black Efforts for Soul
in Television, Albert H. Kramer, William D. Wright,
Petitioners

v.

Federal Communications Commission and United States
of America, Respondents

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONERS
Citizens Communications Center
Black Efforts for Soul in Television
et al.

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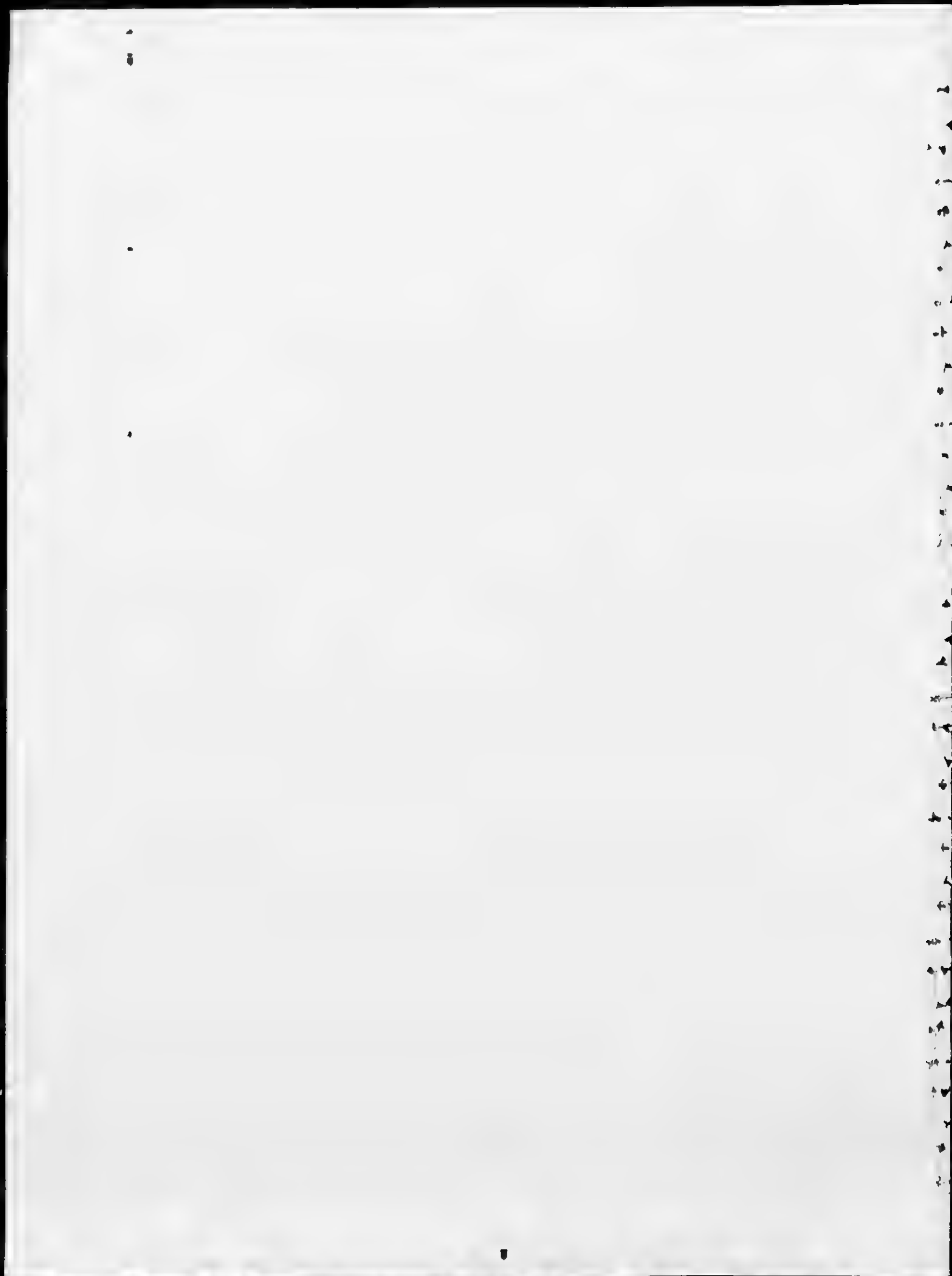


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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,221

Citizens Communications Center, et al., Appellants

v.

Honorable Dean Burch, Chairman Federal Communications
Commission, et al., Appellees

No. 24,471

Citizens Communications Center, Black Efforts for Soul
in Television, Albert H. Kramer, William D. Wright,
Petitioners

v.

Federal Communications Commission and United States of
America, Respondents

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONERS
Citizens Communications Center
Black Efforts for Soul in Television
et al.1/

INTRODUCTION

This brief replies to briefs filed by respondent F.C.C.
(F.C.C. Br.) and intervenors WTAR (WTAR Br.) and RKO-General (RKO
Br.). Petitioners deal, in turn, with their arguments:

1/As used in this brief, "petitioners" refers to CCC and BEST, peti-
tioners in No.24,471 and appellants in No.24,221. Where necessary
other parties are referred to by name.

1. That the Policy Statement on Comparative Renewal Proceedings (J.A. 5) challenged here is not a "final order" within the reach of § 402 of the Communications Act of 1934 (F.C.C. Br. 17-24, WTAR Br. 7-16) and that whether or not "final" under § 402, the Policy Statement is not "ripe" for review; (Ibid.)

2. That the Policy Statement does not violate the Communications Act as interpreted by the Supreme Court in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945); (F.C.C. Br. 27-34, WTAR Br. 19-22, RKO Br. 26-30)

3. That the Policy Statement does not infringe on the First Amendment right of access to the broadcast media; (F.C.C. Br. 35-37) and

4. That the Policy Statement does not deprive emerging minority groups of equal protection of the laws. (F.C.C. Br. 37-39.)

I. Finality and Ripeness

The Commission and WTAR challenge the reviewability of the orders appealed from here and their "ripeness". Since petitioners' posture is unique, we discuss that issue from petitioners' point of view alone, without reference to the positions of Hampton Roads and Community, petitioners in No.24,491.

A. The Commission Has Conceded This Court's Jurisdiction Under Section 402 of the Communications Act

There are two appeals here. One is from the District Court's dismissal, for want of jurisdiction, of petitioners complaint for injunction against issuance of the Policy Statement. (Pet. Br. 18-19).^{1/} The other is from the Memorandum Opinion and Order of the Commission of July 21, 1970, denying petitioners' petitions for reconsideration and for repeal of the Policy Statement and for reconsideration of the earlier denial of petitioners' petition for a rule making on the subject matter of the Policy Statement.

1. Section 402(a) of the Communications Act, 47 U.S.C. § 402(a) gives this Court jurisdiction to review and set aside "any order" of the Commission. Section 2344 of Title 28 U.S.C. limits this jurisdictional grant to "all final orders of the [F.C.C.]."

^{1/}Petitioners have not, as the Commission states, (F.C.C. Br. 3, n.1), abandoned their appeal in No.24,221. All steps necessary to perfect that appeal have been taken. Petitioners did not anticipate the F.C.C.'s reversal of position described here and hence did not treat the jurisdictional question in the main brief.

2. Petitioners had challenged the Policy Statement in the District Court, prior to its issuance, under the Administrative Procedure Act, 5 U.S.C. 701-706. The F.C.C. argued, and persuaded the District Court, that it had no jurisdiction under the A.P.A. Suggestion of Lack of Jurisdiction Made Pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure and Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, (Filed Jan. 15, 1970, in District Court Docket No. 42-70, D.C. Cir. No.24,221). J.A. 1. The F.C.C. argued:

Plaintiffs' claim that this Court has jurisdiction over this matter under the Administrative Procedure Act, (citing 5 U.S.C. 553, 701-706), is in error. 5 U.S.C. 702 provides that "a person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. 703 further states that the form of such review "is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . ."

There is such a statute which affords plaintiffs judicial review in the Court of Appeals of the matter complained of herein. The Communications Act provides that exclusive judicial review jurisdiction is vested directly in the Courts of Appeal. 47 U.S.C. 402(a); see also 28 U.S.C. 2342-2344. Hence, District Court jurisdiction is lacking at the outset. See Yakus v. United States, 321 U.S. 414, 429-446 (1944). Assuming arguendo that these plaintiffs would be 'aggrieved' within the meaning of that term as used in 28 U.S.C. 2344 by the proposed action of the Commission of which they complain, then under Section 402(a) of Title 47, U.S.C. plaintiffs have a right to judicial review in the Court of Appeals. In view of this statutory prescription of judicial review directly in the Court of Appeals, it has long been settled that District

Courts ordinarily lack jurisdiction to review interlocutory or final Commission orders.
Id. at 7 (emphasis added).

* * * *

Plaintiffs Have an Adequate Remedy at Law

Plaintiffs are clearly not entitled to a preliminary injunction for the reason that they have an adequate remedy at law. If the Commission should act as plaintiffs allege it is about to, plaintiffs can then ask the Commission to reconsider its action. Should the Commission then render an opinion unfavorable to plaintiffs, as we have stated supra, judicial review by the Court of Appeals may be sought under Section 402 (a) of the Communications Act, 47 U.S.C. 402 (a). A full range of remedies is available in that Court including a stay pendente lite.
Id. at 9.

This argument was repeated at the oral hearing on January 23, a week after issuance of the Policy Statement. The procedure outlined by the Commission in its Suggestion, p. 9, supra,
1/
is precisely the procedure petitioners followed. J.A. 18.

3. To argue now that the Commission's action is not final, that this Court does not have jurisdiction (F.C.C. Br. 17, and see WTAR Br. 11-16) and that the appeal (in 24,471) should be

1/ Petitioners in 24,471 seek review not of the Commission's January 1970 issuance of the Policy Statement, J.A. 5, but, instead, of the July 21, 1970, Memorandum Opinion and Order denying their petition for repeal of the Policy Statement, and denying their petition for rule making. J.A. 18. (Pet. Br. 1-2.) This order was promulgated after the filing of opening and responsive pleadings, with time allowed by the Commission for comments of others (F.C.C. Br. 14-15, 47-48.) The decision was styled "Memorandum Opinion and Order" (emphasis added). These "formalities preceding and attending the administrative action" are matters arguing for finality. Medical Committee for Human Rights v. S.E.C., App. D.C. _____, _____, 432 F. 2d 659, 667 (1970).

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dismissed (F.C.C. Br. 24) is a confession by the Commission that it led the District Court into error.^{2/} If so, it cannot be heard here to repudiate the position it has taken earlier unless it makes a formal confession of error. This would require a remand to the District Court for adjudication of petitioners' action on the merits. But since the matter is here, has now been fully briefed and is moreover a matter of law only, the more appropriate course is for this Court to resolve these appeals on their merits. Cf. Environmental Defense Fund v. Hardin, ___ U.S. App. D.C. ___, ___, 428 F. 2d 1093, 1098-99 (1970).

B. The Challenge to Reviewability and Ripeness is in Fact a Challenge to Petitioner's Standing

In its Suggestion, supra, the F.C.C. admitted this Court's jurisdiction under § 402(a) and 28 U.S.C. § 2344 save only if petitioners were not "aggrieved". This is, of course, one of the tests applied to determine standing, especially the standing of public interest intervenors and "private attorney generals", to participate in administrative action. Association of Data

2/In fact, unless 5 U.S.C. § 703, 47 U.S.C. § 402 (a) and 28 U.S.C. Section 244 conferred exclusive jurisdiction in this Court the District Court did err in dismissing the action. In National Student Ass'n v. Hershey, 134 U.S. App. D.C. 56 412 F. 2d 1103 (1969) this Court reversed the District Court's dismissal for lack of jurisdiction of an action to declare unlawful and enjoin enforcement of a Selective Service letter and memorandum instructing local boards to reclassify draft age youths who participated in anti-war demonstrations. Accord, Bucks County Cable TV, Inc. v. United States, 299 F. Supp. 1325 (E.D. Pa. 1969). The Selective Service action was, if anything, less "final" than the Policy Statement. Local boards could disregard the Hershey letter; hearing examiners cannot disregard the Policy Statement.

Processing v. Camp, 397 U.S. 150, 153-155 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Environmental Defense Fund v. Hardin, supra, ___ U.S. App. D.C. at ___, 428 F. 2d at 1096-98, (1970); Scanwell v. Shaffer, 137 U.S. App. D.C. 371, 376, 382, 424 F.2d 859, 864, 870 (1970). But, as the Commission is aware, petitioners' standing as public intervenors is well settled by these decisions and by the landmark opinion of this Court in Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966). The Commission seeks to avoid this by casting its opposition to public intervention in terms of finality and ripeness.

2. The decisions cited by the Commission (F.C.C. Br. 17-18) and WTAR (WTAR Br. 12-15) deal with the finality of an agency order, within a specific administrative proceeding, that defined the rights of private litigants seeking to vindicate private interests. Like the Commission's order applying the Policy Statement to the renewal proceeding in which Hampton Roads and WTAR are competing, dismissed by this Court as not final, in each of the cases cited by the F.C.C. and WTAR the order appealed from was preliminary, in one or another sense, to a final decision ^{1/} from which the aggrieved party could later appeal.

But unlike Hampton Roads and Community, petitioners in

^{1/}The one exception is Chicago and Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948), in which the critical factor was the power of the President as a foreign policy matter to ignore or otherwise overrule the C.A.B.

No.24,491, CCC and BEST are not parties to nor intervenors in any specific renewal proceeding before the Commission. ^{1/} Rather, their interest is in improving television and in promoting the responsiveness of the media to local constituencies. (Pet. Br. 4.)

They come before this Court in this matter as they came before the Commission -- as public intervenors. Their interest is in restoring the threat of challenges to license renewals as a competitive "spur" to better broadcasting service. The Policy

Statement has effectively eliminated this spur. (Pet. Br. 12, ^{2/} 15-18, 31). By chilling competition generally the Policy Statement is indeed "final" in its effect on the public interest, and hence is final as to petitioners CCC and BEST. See, Medical Committee for Human Rights v. S.E.C., supra, ____ U.S. App. D.C. at ____, 432 F.2d at 666; National Student Association v. Hershey, supra, 134 U.S. App. D.C. at 72-73, 412 F. 2d at 1119-20.

3. For petitioners, then, there has been "a consummation of the administrative process", and a "right" -- the right to the

But they can intervene

1/Petitioners are at a loss to understand the Commission's statement that "several renewal hearings now pending . . . involve applicants supported by CCC and BEST". (F.C.C. Br. at 20.) Petitioners have not intervened nor sought to support any party to any pending proceeding in any way. The statement is false.

2/The harm to this interest is not dependent "only on the contingency of future administrative action" (F.C.C. Br. at 24.) Since the filing of petitioners' main brief, the Commission has approved the withdrawal of still another competing application in exchange for reimbursement of the applicant's expenses by the incumbent. Post-Newsweek Stations (WPLG), F.C.C. 70R-389, ____ F.C.C. 2d ____ (November 16, 1970). No new competing applications have, moreover, been filed.

This question is ripe

spur of competition conferred on the public by the Communications Act -- has been "denied". Chicago and Southern Airways v. Waterman Steamship Corp., supra, 333 U.S. at 113. For petitioners and for the viewing and listening public they represent, the Policy Statement does indeed "represent the culmination of the administrative process" and not "its beginning", as the Commission argues. (F.C.C. Br. 21.)

4. Given the position of CCC and BEST, the Commission's action is both final and "ripe" for review.

"The doctrines of ripeness and finality are designed to prevent premature judicial intervention in the administrative process before the administrative action has been fully considered and before the legal dispute has been brought into focus."

Environmental Defense Fund v. Hardin, supra, ____ U.S. App. D.C. at ____, 428 F. 2d at 1098 (footnote omitted).

Here the administrative process leading to the issuance of the Policy Statement has been considered and reconsidered; the legal dispute is in focus as sharply as it will ever be between these petitioners and the F.C.C.

As this Court has stated:

"[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit."

Environmental Defense Fund v. Hardin, supra, ____ U.S. App. D.C. at ____ 428 F. 2d at 1097.

II. The Communications Act and Ashbacker

Neither the F.C.C., (F.C.C. Br. 29-33), nor RKO (RKO Br. 26-30) respond to the explanation in petitioners' brief (Pet. Br. 20-26) of why the Policy Statement violates Section 309 of the Communications Act and the principles established in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945). Petitioners stated that the Policy Statement eliminates the statutory comparative hearing on all relevant comparative criteria; a hearing in which, as required by Ashbacker, the newcomer's application as well as the renewal application is examined. It substitutes a hearing which is not only on one issue, the "substantial" character of past programming, but which is a hearing on the incumbent's renewal application alone.

A. Procedure vs. Substance

The Commission urges that Ashbacker dealt only with "procedure". If so, it was a "procedure" -- the right of each applicant to a hearing -- that the Supreme Court held was required by the Act. Moreover, the Commission (F.C.C. Br. 20) distinguishes Ashbacker, as "procedural", from the substantive (i.e., giving "decisional" -- decisive -- "significance" to past programming) Policy Statement in order to avoid Ashbacker; it then turns around and calls the Policy Statement "procedural rather than . . . substantive" (F.C.C. Br. 44) in order to avoid Section 4 of the Administrative Procedure Act.

The issue cannot be avoided by labels. The effect of

the Policy Statement is to destroy the statutory right of a new applicant to a hearing on his application.

B. Competing Application or Petition to Deny?

The Policy Statement converts a comparative hearing into a hearing on the incumbent's past performance alone, instead of a hearing on both his and the newcomer's application. It thereby converts the comparative hearing into a Petition to Deny proceeding. Such proceedings are, of course, separately provided for in the Act. Communications Act of 1934, § 309(d), 47 U.S.C. § 309(d). In such a proceeding, the petitioner does not seek the license; he seeks only to prevent its award again to the incumbent. Hence only the performance of the licensee and the merits of his renewal application are in issue. Since there is no competing application, there is no issue of the qualifications of any competitor. This is precisely what happens in a comparative proceeding under the Policy Statement. The Commission has in effect abolished the comparative hearing mandated by Section 309(a) and (e) and replaced it with a Section 309(d) proceeding. As it did before be-

Good point

¹/As the Commission itself noted, the Court's concern in Ashbacker was that

a hearing designed as one for an available frequency became in substance one for the revocation . . . of an outstanding license. [Ashbacker] held that 'where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.' (326 U.S. at 333.)

F.C.C. Br. at 28-29.

(continued)

ing corrected by the Supreme Court in Ashbacker, the Commission has here amended the statute.

C. The Dicta in Greater Boston

Petitioners have shown that the Policy Statement does not merely return to the rule of Hearst Radio Inc. (WBAL), 15 F.C.C. 1149 (1954). (Pet. Br. 9-10, 29-30.) For the Policy Statement goes beyond Hearst, which merely awarded to the incumbent an advantage based on past performance.^{2/} Nonetheless, the Commission relies on this Court's statement that the Policy Statement "in essence carries forward the general policy on renewals expressed in Hearst Radio Inc. (WBAL), 15 U.S.C. 1149 (1954)." (F.C.C. Br. 31, citing Greater Boston Television Corp., v. F.C.C., ___ App. D.C. ___, ___ F.2d ___, No.17,785 (November 13, 1970).) Of course, the Court was not deciding the legality or analyzing the effect of the Policy Statement in Greater Boston, and the reference to it, made without the benefit of argument on the precise issues involved, must be considered as obiter.

1/(continued) Here too a hearing designed to accomplish one purpose has become in substance a hearing of another type because an applicant is denied a hearing which Congress chose to give him.

2/Petitioners, as the Commission notes, (F.C.C. Br. 31), have conceded that the incumbent may be entitled to some preference based on its past performance. But petitioners pointed out that the legislative history of the 1952 amendments to the Communications Act made clear that Congress did not intend the holding of a full comparative hearing to be conditioned upon a prior determination of inadequate performance by the incumbent. (Pet. Br. 7-9.) Although RKO goes to great lengths (RKO Br. 15-22) to rebut the legislative history cited in Hampton Roads and Community's brief in No.24,491, to the effect that a licensee is entitled to no preference based on his past performance, it fails to refute the legislative history discussed in CCC's and BEST's brief.

III. The Policy Statement Violates The First Amendment by Overburdening Access to the Airwaves

Petitioners have argued that the First Amendment protects the opportunity to compete for a broadcast license. (Pet. Br. 33-37.) The basis of this argument is that the Commission's interpretation of the programming responsibilities of a licensee gives nearly unfettered discretion to the licensee. (Pet. Br. 34.) Each programming decision is an exercise of speech -- the choice of one topic or one speaker over another. Control of the exercise of this speech necessarily goes with the license. There is a limited number of licenses and thus of opportunities to exercise speech. Therefore there is a First Amendment interest in maximizing the opportunity to compete for licenses. By cutting down that opportunity the Policy Statement violates the First Amendment.

The Commission responds to this argument defensively by saying "a licensee does not have virtually unfettered discretion under the fairness doctrine." (F.C.C. Br. 36). But this is simply not responsive to petitioners' contention that the Commission allows its licensees "nearly unfettered discretion" in controlling "what is broadcast and by whom." (Pet. Br. at 34.) First, it should be noted that the fairness doctrine controls only one small portion of "what is broadcast" (and, as shall be discussed below, even here the licensee's discretion is great). But even more important is that the regulatory scheme as presently structured, even if working well under the eyes of a vigilant Commission, would accord great discretion to a licensee. The fact that the Commission may sometimes be less than vigilant compounds the delegation of discretion problem; it does not eliminate it.

Petitioners do not necessarily argue that the Commission could or should engage in closer supervision of its licensees in any of the programming areas to be discussed below. Indeed the First Amendment and the censorship prohibition of the Communications Act of 1934, § 326, 47 U.S.C. § 326 may forbid the Commission to exercise closer control. But so long as there must be a limit on the number of speakers, i.e., licensees, who themselves have this right to speak on the air free of control, then the First Amendment must also require that there be a maximum opportunity to compete for this right to speak.

1. A licensee's overall programming is to be "balanced" among various kinds of programs but a licensee enjoys great discretion in choosing the "balance". Report and Statement of Policy: Re Programming Inquiry, 20 P. & F. Radio Reg. 1902, 25 Fed Reg. 729 (1960). Thus the Commission has renewed licenses where no news and public affairs programming was proposed. Herman C. Hall, 11 F.C.C. 2d 344 (1968). A licensee has even obtained renewal where he proposed 33 minutes per hour of commercial matter. Accomack-North Hampton Broadcasting Co., Inc., 8 F.C.C. 2d 357 (1967).

2. The licensee is supposed to determine the components of his programming mix by ascertaining the needs and interests of his broadcast audience and providing programs serving those needs and interests. City of Camden, 18 F.C.C. 2d 411 (1969); Sioux Empire Broadcasting Co., 16 F.C.C. 2d 995 (1969); Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 F.C.C. 2d 880 (1969) (hereafter "Ascertainment Primer"); Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants, F.C.C. 68-487, 13 P. & F. Radio Reg. 2d 1903, 33 Fed. Reg. 12113 (Aug. 22, 1968). Not only is the method of "ascertainment" largely within

the licensee's discretion; the programming that is shown need bear little or no relationship to the needs that have been ascertained. The licensees' programming response is almost totally within his discretion even in the elaborate paper ascertainment scheme.^{1/}

3. The licensee may reject program material that is conceded to be of clear social and cultural value, acknowledged to be of significant dramatic quality, and which intimately touches a problem of deep concern in the community he serves on the ground that he finds it too suggestive for his taste. Citizens Communications Center Complaint re Discriminatory Programming, 25 F.C.C. 2d 705 (1970).^{2/}

1/The ascertainment-programming sequence involves four steps. Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants, supra. At each step the licensee is instructed to exercise discretion:

a) In gathering information on community needs, "he may use any valid method he chooses" to assure that he has reached a cross section of the community. Ascertainment Primer, Question 9, 20 F.C.C. 2d 882.

b) The licensee chooses from among all information he receives which problems are of "significant" community concern and should be listed in his renewal application. Ascertainment Primer, Question 23, 20 F.C.C. 2d at 884.

c) He evaluates the relative importance of the community problems he has uncovered. Under normal circumstances, he need not report the basis of his evaluation to the Commission. Ascertainment Primer, Questions 24-25, 20 F.C.C. 2d 884.

d) In planning broadcast matter to deal with what he has determined to be significant community problems, he determines both the problems with which he will deal, Ascertainment Primer, Question 26, 20 F.C.C. 2d 884, and the nature of the programming that will deal with those problems. Ascertainment Primer, Questions 29-31, 20 F.C.C. 2d 884-885.

2/This ruling is incorrectly cited as Back Alley Theatre, Inc., at 34, 37 of Petitioner's brief.

4. A licensee is not obligated to sell time to issue-oriented groups that desire to present announcements about controversial issues in the community. Business Executives Move for a Vietnam Peace, 25 F.C.C. 2d 242 (1970). And this is true though the purchaser be a major political party, Democratic National Committee, 25 F.C.C. 2d 216 (1970), or a group of United States Senators who desire to purchase longer time segments to present their views on one of the two great issues of the decade (the Indochina War) to the American people. Committee for Fair Broadcasting, 25 F.C.C. 2d 283, 286 (1970).

5. A licensee may censor (via the "blip-out") remarks of a guest whom he has invited to speak on a panel show if he does not approve of the views the guest expresses where the omission is unrelated to any need to edit the program to conform to time slots, etc., or to any potential legal liability of the licensee. Response to Inquiry by Honorable Richard L. Ottinger re Censorship of Judy Collins, F.C.C. Mimeo #47876 (April 20, 1970).

6. The fairness doctrine, to which the F.C.C. refers as limiting licensee discretion, has been narrowly interpreted. The Commission has refused to extend it to cover product advertisements except for cigarettes. Thus the Commission has refused to apply the fairness doctrine to require response to advertising promoting the sale of pollution-causing automobiles. Friends of the Earth, 24 F.C.C. 743 (1970).

7. Where the fairness doctrine is held to apply, the Commission's stated policy is to vest broad discretion in its licensee. ^{1/} Applicability of the Fairness Doctrine in the Handling of

^{1/}The Commission has consistently taken this position in this Court and continues to do so in all matters pending before this Court. E.g., Green v. F.C.C., No. 24,470; Friends of the Earth v. F.C.C., No. 24,556.

Controversial Issues of Public Importance, 29 Fed. Reg. 10,415 (1964) (hereafter "Fairness Primer"); Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949); Applicability of the Fairness Doctrine to Cigarette Advertising, 32 Fed. Reg. 13,162.^{1/} A licensee who presents cigarette advertisements eight times as often as it presents opposing points of view is complying with the fairness doctrine. National Broadcasting Co. (WNBC-TV), 16 F.C.C. 2d 947 (1969). The fairness doctrine is deemed satisfied by providing, as rebuttal to five Presidential addresses on all three networks advocating an Administration policy (with all the advantages the President necessarily has), one prime time presentation by a spokesman of the licensee's choice at a time of the licensee's choosing in an uninterrupted format of the licensee's choice in competition with the regular television fare of the other two networks. Committee for Fair Broadcasting, supra. In any event, isolated violations of the fairness doctrine are not grounds for denying renewal. E.g., Anti-Defamation League, 4 F.C.C. 2d 217 (1966), aff'd on rec'n, 6 F.C.C. 2d 385 (1966).^{2/}

^{1/}This discretion extends to determination of whether a controversial issue has been raised; definition of the issue; the amount of time, and the time, format, spokesman, and frequency of presentation of the opposing point of view. Fairness Primer, 29 Fed. Reg. at 10,419. See Committee for Fair Broadcasting, supra, 25 F.C.C. 2d 291-94 (1970).

^{2/}Petitioners could not have picked a better example than the Commission's citation of United Church of Christ v. F.C.C., 123 D.C. App. 328, 359 F.2d 994 (1966) (for the proposition that adherence to the fairness doctrine is a *sine qua non* of renewal) to illustrate why it is necessary for there to be a more direct means of access than reliance on Commission enforcement of its programming requirements. It took six years, two appeals to this Court, and this Court's unwillingness to again subject the petitioners in that case to the abuses heaped upon them by the Commission before the fairness doctrine issues raised in that proceeding were resolved. United Church of Christ v. F.C.C., ___ App. D.C. ___, 425 F. 2d 443 (1969).

In short a licensee's discretion is far reaching. It matters not whether this is because of regulatory laxity or the prudence which must attend any exercise of government power in the sensitive area of speech. A licensee is daily called upon to make hundreds of decisions for which he is not accountable. Each of these decisions has an impact in the marketplace of ideas. And each person is entitled to compete for an opportunity to exercise the power over speech on the airwaves that cannot be exercised except by having a license.

The competing First Amendment considerations of freedom from censorship on the one hand and opportunity for access to a media voice on the other are in delicate balance. Licensee discretion on one side must be balanced by maximum opportunity to become a licensee on the other. To cut back on the opportunity of potential competitors to become licensees not only risks upsetting the balance; it also cuts back absolutely on the First Amendment rights of all potential competitors. The Commission cannot do this in the absence of a compelling showing. There has been no such showing here. The Commission has relied on vague references, unsupported by any facts or experience, that the stability of the broadcast system is at stake in the absence of the Policy Statement.^{1/} Speculation cannot overcome the First Amend-

^{1/} The Commission cites this Court's language in Greater Boston Television Corp., supra, that the renewal expectancy is necessary to promote security of tenure to induce effort and investment by a licensee. (F.C.C. Br. 32.) But these expectancies thrived for many years with full comparative hearings. And there is no reason why comparative hearings must now be abrogated to refertilize them.

Significantly, the Commission offers no financial data about the profitability of broadcasting to aid in the determination of the need for the Policy Statement and whether in fact the lack of competition for licenses has not led to excessive profits rather than incentive to improve programming and technical facilities.

(continued)

ment.

1/ (continued) Petitioners have requested such data of the Commission but have as yet received no reply to the request. Letter to John M. Torbet, Executive Director, Federal Communications Commission, from William A. Dobrovir and Albert H. Kramer (February 12, 1971).

IV. The Policy Statement Deprives Newly Emerging Minority Groups of Equal Protection of the Laws by Depriving Them of the Opportunity Accorded Whites to Gain Access to the Airwaves

Petitioners have shown the unequal status of Black and other minority groups as broadcast licensees. (Pet. Br. 37-39.) The F.C.C.'s response is that Commission regulation assures Blacks of adequate access to the airwaves, representation of their interests and service to their needs. Indeed, the Commission urges (F.C.C. Br. 37-39) that a failure to fulfill these requirements of service would be deemed, under the Policy Statement, "serious deficiencies" that would result in refusal to renew. Such requirements include "service to minority groups" (F.C.C. Br. 37) and the absence of "racial discrimination". (Id. 38.)

These requirements are not a substitute for control of licenses by Black groups.

1. While "service to minorities" must in theory be provided the Commission has stated that it will not interfere with a white licensee's judgment as to how such services are provided. E.g., The Evening Star Broadcasting Company, F.C.C. 71-126, ___ F.C.C. 2d ___, Slip Op. at 9-15, 19-22 (February 5, 1971); Citizens Communications Center Complaint re Discriminatory Programming, supra.

2. The service to minority groups and the community in general is, as noted, supposed to be based on an ascertainment of community needs. Ascertainment Primer, supra. "Ascertainment" is to a large extent mere window-dressing. As noted, the licensee has great

discretion both in the method of ascertainment and in his programming. Without sanction, he may fail to consult a representative minority group in his ascertainment. Without sanction, he may underrepresent minorities in his programming after "ascertainment." The Commission will not disturb his judgment as to whom he should consult in the ascertainment in the minority community or as to the nature of the consultation. Evening Star Broadcasting Co., supra, Slip Op. at 3-10, 12-14, 20-22, 25-27.

3. The Commission will not even hear allegations of discrimination in employment where blacks have 7% of a licensee's jobs in a city that is 70% black, Evening Star Broadcasting Co., supra, Slip Op. at 14, 21-22, or where black employees have been fired in order to allow a licensee to institute a "broader" appeal programming format and have filed a lawsuit under the Civil Rights Act. KSOL, San Francisco, Mimeo #61571. (Action by letter of January 27, 1971.)

In short, nothing but black control of a license will adequately ensure black exercise of these discretionary powers. To cut off the opportunity for blacks to gain control of a license, as the Policy Statement has done and will continue to do -- an assertion that stands without contradiction by respondents -- denies blacks equality of opportunity and equal protection of the laws.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court grant the following relief:

(a) Reverse the Commission's order of July 21, 1970 denying petitioners' petition for reconsideration of the Policy Statement;

(b) Reverse the Commission's order of July 21, 1970 denying petitioners' petition for repeal of the Policy Statement;

(c) Declare the Policy Statement to be contrary to law;

(d) Remand these proceedings to the Commission with directions to redesignate all comparative renewal hearings to which the Policy Statement was deemed applicable to reflect this Court's judgment in (a)-(c) above; and

(3) Order the Commission not to apply the Policy Statement in any pending or future comparative renewal hearing.

Respectfully submitted,

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